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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

NORTHERN NATURAL GAS COMPANY, ET AL., *Petitioners,*

v.

MOBIL OIL CORPORATION, ET AL., *Respondents*

and

RALPH GROUNDS, ET AL., *Respondents.*

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX A

Opinion of the United States Court of Appeals for the Tenth Circuit, Dated March 2, 1971 (441 F.2d 704)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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JANUARY TERM, 1971

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al. (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

Appeals from the United States District Court for the District of Kansas

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The above caption was adopted in a court-approved stipulation. These 88 appeals are from a judgment entered in eight consolidated civil actions, all filed in, or transferred to, the United States District Court for the District of Kansas. In one aspect or another, each is a class action. For convenience, the parties are divided into four groups, (1) the landowners, (2) the lessee-producers, (3) the Helex group, and (4) the United States.

Wayne Coulson and Dale M. Stuckey argued the cause for the landowners. With them on the brief were Bernard E. Nordling, Leland E. Nordling, Gene Stipe, Richard L. Gossett, Leo Winters, and W. A. McWilliams, attorneys for landowners; Donald I. Mitchell, attorney for Federal Land Bank; and of counsel were Kramer, Nordling & Nordling, Fleeson, Gooing, Coulson & Kitch, and Stipe, Gossett & Stipe.

Richard Jones, James B. Diggs, Gerald Sawatzky, and George C. Spradling argued the cause for the lessee-pro-

ducers. With them on the brief were Arloe W. Mayne, G. Fred Charles, J. M. O'Loughlin, and Stanley G. Andeel, attorneys for Ashland Oil & Refining Company; William C. Charlton and Stanley G. Andeel, attorneys for Cabot Corporation; Cecil C. Cammack, Alfred O. Holl, Roy Z. Johnson, R. O. Mason, and Stanford J. Smith, attorneys for Cities Service Oil Company; Stanley G. Andeel, attorney for Dorchester Gas Producing Company; Wm. F. Pielsticker, attorney for Gulf Oil Corporation; William R. Horkey, Leon C. Gavras, and Stanley G. Andeel, attorneys for Helmerich & Payne, Inc.; Charles B. Wallace, Donald G. Canuteson, and William H. Tabb, attorneys for Mobil Oil Corporation; F. O. Hickman and R. H. Landt, attorneys for Pan American Petroleum Corporation; H. A. Berry, W. M. Sutton, W. E. Notestine and George B. Collins, attorneys for Diamond Shamrock Corporation; Murray Christian and R. T. Robberson, attorneys for The Superior Oil Company; Eugene G. Bell, attorney for Mapco Production Company; Philip R. Wimbish, Elmer W. Adams, and Stanley G. Andeel, attorneys for Texaco, Inc.; and of counsel were Foulston, Siefkin, Powers & Eberhardt, attorneys for Ashland Oil & Refining Company, Cabot Corporation, Dorchester Gas Producing Company, Helmerich & Payne, Inc., and Texaco, Inc., Hershberger, Patterson, Jones & Thompson, attorneys for Mapco Production Company, Mobil Oil Corporation, and The Superior Oil Company, Holliman, Mason & Maddux, attorneys for Cities Service Oil Company, Lilleston, Spradling, Gott, Stallwitz & Hope, attorneys for Pan American Petroleum Corporation, and Underwood, Wilson, Sutton, Heare & Berry, attorneys for The Diamond-Shamrock Corporation.

Emmet A. Blaes, Richard B. McDermott, William S. Richardson, and Mark H. Adams II argued the cause for the Helex group. With them on the brief were Jack W. Wertz, George E. Peabody, and Mark H. Adams of Adams, Jones, Robinson and Manka, attorneys for Cities Service Gas Company; Mark H. Adams of Adams, Jones, Robinson

and Manka, attorneys for Cities Service Cryogenics, Inc. and Cities Service Helex, Inc.; Wm. J. Zeman, Lloyd G. Minter, Kenneth Heady, and Boesche, McDermott and Eskridge, attorneys for Phillips Petroleum Company; Jochems, Sargent and Blaes, Wendell J. Doggett, and William L. Robertson, attorneys for National Helium Corporation and Panhandle Eastern Pipe Line Company; F. Vinson Roach, Patrick J. McCarthy, and Mark H. Adams of Adams, Jones, Robinson and Manka, attorneys for Northern Natural Gas Company, Northern Helex Company, and Northern Gas Products Company.

Floyd L. France argued the cause for the United States. With him on the brief were Shiro Kashiwa, Assistant Attorney General, Bernard V. Borst, Assistant United States Attorney, and S. Billingsley Hill, Attorney, Department of Justice.

Before BREITENSTEIN, SETH and MCWILLIAMS, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Helium, a rare element found as a component of natural gas, has become in the last 20 years increasingly important to national defense, science and industry. Through scientific and technical advances this inert and noncombustible gas, which was formerly wasted at the burner tips of gas appliances, now has great value. Congress recognized the need for helium by the Helium Act Amendments of 1960, Pub. L. 86-777, 74 Stat. 918, 50 U.S.C. § 167 et seq., which provide for a helium conservation program, with private participation, under the control of the Bureau of Mines, an agency of the Department of the Interior.

The natural gas fields of the Hugoton area in Western Kansas and the Oklahoma and Texas panhandles contain

99% of the nation's recoverable supply of helium. The landowners gave the leases under which the helium-bearing gas is obtained from the earth. The lessee-producers drilled the wells, produced the gas, and sold it to interstate pipelines which are under the jurisdiction of the Federal Power Commission. Affiliates and subsidiaries of the pipelines, the Helex group, separate helium from other gaseous components and sell the mixture to the United States. The Bureau of Mines stores the helium mixture and refines it to 99.99% pure helium for sale to government agencies and private industry. The basic issue is whether the landowners and the lessee-producers can receive benefit from the value of the helium. The trial court rejected all claims of the landowners and lessee-producers to the helium and gave judgment for the Helex group and the United States. See Northern Natural Gas Company v. Grounds, D.Kan., 292 F.Supp. 619. We reverse. In our opinion the Helex companies must account to the lessee-producers for the reasonable value of the helium contained in the processed gas and the lessee-producers must pay royalty on such value to the landowners.

Six of the eight actions which were consolidated for trial are in the nature of interpleader. The fund in each suit is the money paid and to be paid by the United States to the interpleading plaintiffs for the helium-gas mixture produced and sold by them. Four of the cases were brought by Cities Service Gas Company, a pipeline. One was brought by Northern Natural Gas Company, a pipeline, and its subsidiary Northern Helex Company. In each of these five cases the defendants are named landowners and named lessee-producers in each instance as representatives of a class. The sixth interpleader was brought by National Helium Corporation which is owned in equal shares by Panhandle Eastern Pipe Line Company and National Chemical and Distillers Company. The defendants are Panhandle Eastern and named landowners as representatives of a class. Pursuant to a third-party complaint by

Panhandle Eastern, named lessee-producers were brought in as representatives of a class. Motions to dismiss the interpleaders on jurisdictional grounds were denied by the trial court and we affirmed. Grounds v. Northern Natural Gas Company, 10 Cir., 327 F.2d 1003.

The remaining two actions were brought by named landowners, as representatives of their class, against the United States. One is under the Federal Tort Claims Act, see 28 U.S.C. §§ 1346(b), 1402, and 2674, on the theory of conversion, and the other under the Tucker Act, see 28 U.S.C. § 1346(a)(2), on the theory of reverse condemnation.

All eight actions were maintained in the district court as class actions under Rule 23, F.R.Civ.P. One class is the landowners and the other is the lessee-producers. The district court held that the actions were properly maintainable as class actions. See 292 F.Supp. 619, 633-637. On these appeals no question is raised as to the propriety of the district court treatment of the cases as class actions.

After consolidation, there were extensive discovery proceedings, a definitive pre-trial order, and a 43-day trial limited to the question of liability. The trial court made full and detailed findings of fact which are found at 292 F.Supp. 619. For the sake of brevity in this opinion, we repeat only those facts which we deem necessary for understanding of the case and disposition of the issues. It is enough to say that we find no material dispute as to the determinative facts. The controversy is over the conclusions to be drawn from those facts and the application of the law thereto.

Helium is a colorless, odorless, and tasteless gas which, in the present state of scientific knowledge, will not react chemically or physically with any other element, except under laboratory conditions. The generally accepted theory is that helium is formed by radioactive disintegration within the earth and migrates to the same reservoir traps as do other gases. Through eons of time it has commingled with,

and become diffused with, natural gas hydrocarbons which were formed from organic materials of ages past. Helium is noncombustible. It is the second lightest element found on earth, next to hydrogen which is highly combustible. Helium does not liquefy at standard atmospheric pressure until it reaches –452.1 degrees Fahrenheit, almost absolute zero and lower than any other gas.

Helium was first discovered in the spectrum of sunlight in 1868. Sometime in the 1890's helium was found on the earth. In 1905, helium was discovered in gas from a well at Dexter, Kansas. Helium remained a laboratory curiosity until 1918 when the United States began commercial extraction of helium from gas produced in the Petrolia Field of Texas for use in military balloons and blimps during World War I.[1]

Before 1960, with minor exceptions, the production and marketing of helium was accomplished by the Bureau of Mines pursuant to the Helium Act of 1925, 43 Stat. 1110. Until the advent of World War II, the uses of helium outside of the laboratory were in lighter-than-air craft and, when mixed with oxygen, in medicine and deep-sea diving. During this period, the United States by purchase and condemnation obtained various rights under which it produced helium at government plants. The 1937 amendments, 50 Stat. 885, to the Helium Act of 1925, directed the Secretary of the Interior to purchase if possible all private helium plants. Under this authority the United States acquired two plants of the Girdler Corporation, the only private helium extraction operation in the country at that time.

During World War II the government constructed four plants to meet the greatly increased military need for helium. After the war all of the plants except one were shut

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[1] For the history of helium and the programs of the United States for its conservation see Clifford W. Seibel's book "Helium—Child of the Sun" 1968, University of Kansas Press.

down. In the 1950's the demand for helium rose spectacularly. This came from a combination of new uses, including atomic weapons, nuclear energy plants, military and civilian rocketry, exploration of outer space, the field of cryogenics, welding of newly used metals, breathing mixtures for medical patients, divers and astronauts, and other uses connected with both science and industry. Because of the limited supply and the wasting of the known reserves, the government set up a Helium Policy Working Group under the chairmanship of Under Secretary of the Interior Chilson. The group recommended a program which envisaged participation by private industry. The 1960 amendments to the Helium Act were the result of these activities.

The record shows that, although helium is contained in either measurable or detectable quantities in gas found in a majority of natural gas fields in the United States, 99% of the nation's helium resources are in the natural gas reserves of the Hugoton area. 292 F.Supp. at 654. This area is approximately 210 miles from north to south, and 160 miles from east to west. It covers approximately 33,000 square miles and over 21 million acres. Underlying the area are about 15% of the known natural gas reserves of the United States. According to some of the testimony, it is the largest single, pressure-connected gas reservoir in the world. The helium content averages between .4% and .5% in volume. The economically recoverable helium is estimated at 119 billion cubic feet from estimated resources of a total of 36.4 trillion cubic feet of gas.

The components of natural gas produced in the Hugoton area are about 85% hydrocarbons ranging from methane, the compound lightest in molecular weight but lowest in Btu (British Thermal Unit, a measure of heat) yield per unit of volume, through ethane and propane up to various heavier hydrocarbons. The remaining 15% is composed of non-hydrocarbon constituents including nitrogen, oxygen, argon, helium, hydrogen sulfide, hydrogen, and carbon dioxide. The composition of gas from separate wells is not

constant. For example, methane runs from a low of 45.9% to a high of 82.6%, nitrogen from 6.5% to 44.3%, and helium from .22% to .97%.

The production of natural gas from underground reservoirs is accomplished by reservoir pressure, specifically the difference between the greater reservoir and lesser wellhead pressure causes the gas to flow through the well bore. The output of gas is produced in its entirety with all of its constitutents randomly commingled. The separation of helium at the wellhead is not economically feasible.

The first gas well in the Hugoton area was completed in Texas in 1918 and was followed by Kansas and Oklahoma wells in 1922. Development of the fields in terms of completed wells was slow until the late 1920's and early 1930's when the extension of pipelines into the area made it accessible to commercial markets. The productive geographical limits expanded gradually and were finally defined in the 1940's. The record shows that prior to 1954 there were 8,504 wells drilled in the area and an additional 1,538 wells in the period 1954-1959.

The gas is produced under leases given by the owners of the appropriate mineral rights. The trial court said that 65% of the leases were taken by lease brokers rather than by representatives of the producing industry. There are thousands of leases and a great variety of lease forms. The leases were either assigned to, or taken by, the companies within the lessee-producer group for development, production, and marketing. The lessee-producers sell the gas to pipeline companies which transport it interstate for resale. The gas is commonly delivered at the wellhead but occasionally at a gathering point and the volume is measured when delivered. The price is stated in terms of cents per Mcf, thousand cubic feet, and is commonly subject to quality adjustments depending on Btu content. Ordinarily, the sales by the lessee-producers are under long-term executory contracts containing price escalation, arbitration, or renegotiation clauses.

The question of title to helium arose during the contract negotiations between the Helex companies and the Bureau of Mines.[2] The Helex companies agreed to warrant title and to indemnify the United States for all ownership claims of third parties. The ultimate cost each seller might have to bear because of title failure is limited by various contract provisions which were thus summarized by the trial court, 292 F. Supp. at 658:

> "The ultimate cost each seller [Helex company] might have to bear as a result of failure of title is limited, however, by provisions that the seller be reimbursed by the United States for all payments made in satisfaction or settlement of ownership claims to helium, to the extent that such payments exceed approximately $3.00 per Mcf of helium."

With this background we turn to the contentions of the parties. Other pertinent facts will be developed in the discussion of specific issues.

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[2] A March 5, 1962, memo by the U. S. General Accounting Office regarding negotiation of helium contracts contains this statement: "Mr. Wheeler [Assistant Director, Helium, Bureau of Mines] advised that in cost negotiations, the contractors were allowed, as part of the unit price, a helium payment of about $2.00 a thousand cubic feet (MCF) of helium delivered because the natural gas companies believed that they could not warrant clear and unrestricted title to the helium. The companies contended that the gas rights owned permitted them to sell natural gas and not helium. Therefore, in order to provide for possible future payments to lessees, the companies insisted upon a helium payment of $2.00 a MCF for helium delivered. Although there has not been any known court cases on this subject, Mr. Wheeler stated that, in essence, this payment provides for a *contingency* in the event that (1) the companies are sued by lessees, (2) the court renders a decision that the companies do not have clear title to the helium contained in natural gas and (3) the companies are liable to pay third parties for the helium extracted from natural gas. (Over the life of the four negotiated contracts, this helium payment will amount to an estimated $125 million.)"

1. LANDOWNERS' CLAIMS.

The landowners contend that the leases cover only combustible oil and gas. The trial court held that the grant of gas in each lease "extends to the entire gas stream which emerges at the wellhead absent an express reservation of any constituent products, and that helium passes thereunder unless expressly reserved."

There are estimated to be approximately 30,000 persons who receive income from the production of helium-bearing natural gas by virtue of ownership of land, mineral interest, royalty, or other interests. Thousands of leases executed on more than 150 printed forms cover the Hugoton gas. Over 75% of the leases were executed after 1940. Leases held by named lessee-producers have at least 50 different granting clauses. Six of these clauses are found in leases covering over 90% of the acreage. These were summarized thus by the trial court, 292 F. Supp. at 660:

KANSAS AND OKLAHOMA LEASES

	Percentage of Acreage
"oil and gas, casinghead gas and casinghead gasoline"	69.688
"oil, gas, casinghead gas, casinghead gasoline and all other gases and their respective constituent vapors"	10.132
"oil and gas"	7.144
"oil, distillate, gas, casinghead gas, casinghead gasoline and all other gases and their respective constituent vapors"	3.311
	90.275

TEXAS LEASES

"oil and gas"	39.860
"oil, gas and all other minerals"	25.517
"oil and gas, casinghead gas and casinghead gasoline"	14.545
"oil, gas, and all other minerals"	14.168
	94.090

Leases covering 99.99% of the acreage contain the words "oil" and "gas." Of the many different granting clauses the landowners regard only five as conveying helium as part of the gas. In these instances the language specifically covers all gaseous substances without regard to their similarity or dissimilarity to "gas" as used in the phrase "oil and gas." The most commonly used lease form grants "oil and gas, casinghead gas and casinghead gasoline."[3]

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[3] The pertinent provisions of this form are:

"1. That lessor, for and in consideration of the sum of One and No/100 - - Dollars ($1.00), in hand paid, and of the covenants and agreements hereinafter contained to be performed by the lessee, has this day granted and leased and hereby grants, leases and lets unto the lessee for the purpose of mining and operating for and producing oil and gas, casinghead gas and casinghead gasoline, laying pipe lines, building tanks, storing oil, building power stations, telephone lines and other structures thereon to produce, save, take care of and manufacture all of such substances, and for housing and boarding employees, the following described tract of land • • •.

"2. This lease shall remain in force for a term ending October 23, 1951, and as long thereafter as oil, gas, casinghead gas, casinghead gasoline, or any of them is produced.

• • • • •

"4. Lessee shall pay lessor monthly as royalty: (a) on gas marketed from each well, one-eigth (⅛) of the proceeds if sold at the well, or, if marketed by lessee off the leased premises, then one-eighth (⅛) of the market value thereof at the well; (b) on gas used by lessee for the extraction of casinghead gasoline, one-eighth (⅛) of the value of the natural gasoline content as determined by the Natural Gasoline Association of America revised contract, adopted April 4, 1939; • • •. Lessor shall have the privilege at his own risk and expense of using gas from any gas well on said land for stoves and inside lights in the principal dwelling located on the leased premises by making his own connections thereto.

• • • • •

"8. The lessee shall have the right to use free of cost, gas, oil and water found on said land for its operations thereon, except water from wells of the lessor. • • •"

By statute in each of the three states a conveyance of real estate passes the entire estate of the grantor unless an intent to pass a lesser estate expressly appears or is necessarily implied. K.S.A. § 58-2202, 16 O.S.A. § 29; Vernon's Ann. Rev. Civ. Stat of the State of Texas, art. 1291. In Kansas and Oklahoma an oil and gas lease is a license, incorporeal hereditament, or profit a prendre. See Summers, The Law of Oil and Gas §§ 161, 164 (1954) and the cases there cited. In Texas an oil and gas lease conveys a fee simple determinable and is a "present conveyance of * * * the entire title to the designated minerals existing in the land." Andrews v. Brown, Tex. Civ. App., 283 S.W. 288, 291. For our purposes we see no difference in result whether the leases are considered as licenses or conveyances.

Our first problem is with the word gas. The trial court said that " 'gas' or 'gases' are used interchangeably to describe any naturally-formed aeriform substances indigenous to the underlying reservoir, which aeriform substances include helium. * * * " See 292 F. Supp. at 686. The learned dissertations of the parties on the derivation and use of the word gas during the last several hundred years is interesting but not conclusive. Gas is a generic term which is defined in Webster's Third New International Dictionary (G. & C. Merriam Co., 1961) as

> "1. A fluid (as air) that has neither independent shape nor volume but tends to expand indefinitely; a substance at a temperature above its critical temperature and therefore not liquefiable by pressure alone. * * *"

As we see the problem, gas has two meanings, one in the physicist's sense conforming to the Webster definition and the other in the vernacular sense with the meaning dependent on the use of the word. The landowners point out that in the leases the word oil and the word gas are used in conjunction. They contend that the terms "oil"

and "gas" taken together are used interchangeably with the term "petroleum." Accordingly, they say, gas must refer to a gaseous hydrocarbon. This is a non sequitur. It is an attempt either to rewrite the leases or to convert a claimed vernacular use into a subjective intent. Nothing in the record shows that "oil and gas" or "petroleum" come from the earth as a pure hydrocarbon. The record does show that Hugoton gas contains noncombustible components. We doubt whether it is possible to produce either oil or gas without at the same time producing some impurities.

The landowners' attempt to bolster their position by reliance on ejusdem generis is not persuasive. Ejusdem generis is a tool to be used in search for the correct meaning of words. Ordinarily it limits general terms which follow specific ones to matters similar to those specified. Gooch v. United States, 297 U.S. 124, 128. The landowners say that the word oil is specific and limits the meaning of gas. We believe that the word oil and the word gas have equal status. Navajo Tribe of Indians v. United States, Ct. Cl., 364 F. 2d 320, 325, 327, to which reference will be made later, rejected the application of ejusdem generis in the construction of a lease of "all the oil and gas deposits." We agree.

The landowners say that the word gas is ambiguous. The argument seems to run like this. Gas has a physicist's meaning to describe a state of matter and a popular, or industry meaning, to cover a mixture of gaseous hydrocarbons. This brings us to the field of semantics. We agree that the meaning of a statement often requires a knowledge of its connotation and that the objective meaning of a word cannot be considered, ordinarily, separate and apart from the context of its actual subjective use. The argument goes that the landowners subjectively intended to grant combustible oil and gas and nothing else. All this does is to lead us to the question of intent which we shall discuss later. In our opinion there is no ambigu-

ity which calls into play the rule that oil and gas leases, when ambiguous, are construed against the lessees and in favor of the lessors. See e.g. Beatty v. Baxter, 208 Okl. 686, 258 P. 2d 626.

Few decisions have any bearing on the specific issue. In Gilmore v. Superior Oil Co., 192 Kan. 388, 388 P. 2d 602, the court was concerned with the deduction of compression expenses from gas royalties. In holding that a lessee could not withhold royalties in order to charge lessors with compression costs, the court commented that if a lessee desires complete coverage "of oil, gas, liquid hydrocarbons, or even helium gas * * * the lessee has the opportunity to protect itself by the manner in which it draws the lease." Ibid at 605. Relying on Curtis Publishing Co. v. Cassel, 10 Cir., 302 F. 2d 132, 135, and like cases, the landowners say that this is a clear and unequivocal statement that an oil and gas lease not mentioning helium does not cover it and, so far as Kansas is concerned, is binding on federal courts. We are not convinced. Gilmore was concerned with duty to market, not with lease coverage. The statement is not considered dictum but is "comment merely obiter," see Hawks v. Hamill, 288 U.S. 52, 59, and is neither conclusive nor particularly persuasive.

The landowners emphasize the Oklahoma casinghead gas cases. Casinghead gas is nothing more than gas from an oil well. Mussellem v. Magnolia Petroleum Co., 107 Okl. 183, 231 Pac. 526, 530. The evidence shows that casinghead gas is composed of the lighter members of the paraffin series, largely methane with some ethane and propane. Casinghead gasoline is composed of heavier elements of the same series.

Hammett Oil Co. v. Gypsy Oil Co., 95 Okl. 235, 218 P. 501, held that a contract for royalty on oil did not entitle the holder to royalty on gasoline manufactured from casinghead gas. Hammett and the cases which followed it are summarized in Broswood Oil Co. v. Sand Springs Home, 178 Okl. 550, 62 P. 2d 1004, 1006, which states the

effect of the Oklahoma rule to be that, absent a contrary intent of the parties, a reservation of royalty on oil and on gas "means oil in its ordinary acceptation and gas from a gas well as the same is ordinarily understood. • • •" The rule established in Hammett and its progeny has been subject to considerable criticism. Ibid. There appears to be some uncertainty in the Oklahoma cases concerned with the problem of whether casinghead gas is within a lease which covers both oil and gas.

For whatever the Oklahoma casinghead gas decisions may be worth and regardless of whether they are sound law, we believe that they are not applicable here. When the lease, or other agreement, provides for royalty on oil from an oil well and on gas from a gas well and casinghead gas is produced from an oil well, the recovery of royalty depends on whether gas emerging from an oil well is commonly understood to be oil. In the Hugoton area, helium emerges as a component of the gas produced from a gas well. It necessarily comes from the wellhead and into the transmission line with all the gases which make up the entire stream. Casinghead gas from an oil well is only incidental to the production of oil and may be separated at the wellhead.

The situation in Texas is different. Lone Star Gas Co. v. Stine, Tex. Com. App., 41 S.W. 2d 48, was concerned with a deed covering "all natural gas." The question was whether natural gasoline was covered by the grant. The court held that it was and said that natural gas meant all the constituent elements composing the gas and that the grantee had the right to sell the gas in the form in which it emerged from the earth or to split it into its constituent elements and sell them. Taking literally, this language is broad enough to embrace helium in a grant of gas. The reasoning of the court, however, will not apply to helium. The court compared oil, gas, casinghead gas, and coal, and drew the premise that but for their distinction in natural form, these substances possess

somewhat similar chemical properties and are readily convertible into gaseous hydrocarbons by artificial means. Helium is not a hydrocarbon and is not convertible into one.

The decision closest to our problem is Navajo Tribe of Indians v. United States, Ct. Cl., 364 F. 2d 320, 324-327. The Tribe claimed that a 1923 lease "of all the oil and gas deposits" referred to gaseous hydrocarbons and not to helium. In the 1940's helium-bearing gas was produced and the Tribe was paid royalties. The Court of Claims found the Oklahoma casinghead gas cases unpersuasive and followed Lone Star. It said that although the parties may have been thinking of fuel-type gases, it was more realistic to presume that "the grant included not only hydrocarbons but the other gaseous elements as well." Our principal difficulty with Navajo is that it treats the problem of whether the word gas includes helium as one of law. This may have been proper when dealing with tribal lands without regard to any state law impediment. We believe that this question is one of fact and of the conclusions which are to be drawn from the facts.

The only other helium case is Hoff v. Girdler Corp., 104 Colo. 56, 88 P. 2d 100. We fail to see the relevance of that decision. The issue was whether the lessee had abandoned the lease. The question whether a grant of gas included helium was not raised.

In Hans v. Great Bend Brick & Tile Co., 172 Kan. 478, 241 P. 2d 475, 478, the court said that a conveyance of all the "oil, gas and other minerals" did not include clay. Oklahoma has held that a reservation of "oil, petroleum, gas, coal, asphalt and all the other minerals of every kind and character" was not a reservation of underground water. See Mack Oil Co. v. Laurence, Okl., 389 P. 2d 955, 961. A similar result was reached in Texas by Fleming Foundation v. Texaco, Inc., Tex. Civ. App., 337 S.W. 2d 846, 852, which held that subsurface water was not within a grant of oil, gas and other minerals.

We believe that it is a fair interpretation of the cases just cited to say that in the three states intent is a question of fact. A plethora of evidence was received on the point. The landowners rely on the meaning of gas in both common and industrial usage. They presented a lexicographer who made a study of dictionaries, encyclopedias, area newspapers and selected magazine articles and stated his opinion that the word gas did not connote helium to the average landowner of the Hugoton area. Their opponents counter with an account of the helium development in the period from 1917 to World War II and emphasize that in federal oil and gas leases made after 1920 the United States expressly reserved helium. A recitation of all of the evidence would serve no good purpose. The trial court found that gas did not connote helium to the average landowner, that no landowner specifically contemplated helium in granting rights to produce gas, and that other evidence establishes "that he had no intention whatever respecting it." 292 F. Supp. at 664. Such findings are supported by substantial evidence and we must accept them.

The landowners say further that the value of natural gas lies in its use as fuel, that helium is valueless as a part of a fuel stream, and that the average landowner could not have intended to convey helium for fuel purposes. The Helex companies, although conceding that the principal use of natural gas has been for fuel, point out that it has other uses of economic value such as a feed stock for petrochemical operations, the manufacture of carbon black, and as a pressuring agent in oil production. Six witnesses who had either taken leases or supervised such activities testified that to their knowledge no land man or lease negotiator had ever discussed the gas to be leased in terms of its constituents. The only lease making specific provision for helium was executed after the start of this litigation. The trial court said that this phase of the argument "is but an attempt to convert an uninformed popular notion respect-

ing the commercial uses of natural gas into an intention by the lessor to convey only those discrete constituents of the gas stream, the uses of which conformed to that notion." 292 F. Supp. at 665.

The trial court concluded its treatment of this part of the case by saying that, in view of the circumstances of lease execution, the definition and usage of terms within the industry, and the intentions of the parties as disclosed by their actions, the leases extend to the entire gas stream absent an express reservation, and helium passes thereunder unless expressly reserved. 292 F. Supp. at 669. The landowners contend that this conclusion is inconsistent with the finding that the average landowner had no intent with regard to helium.

We believe that the issue is whether general or specific intent controls. The claimed general intent is lease coverage of all components of the gas produced by the wells. The specific intent is said to be lease coverage only of combustible gas. General intent includes helium and specific intent excludes it.

Nothing in the leases shows an intent to convey only combustible gas. If that is what the lessors meant, they should have said so. The evidence of the landowners is that they knew nothing of helium. If that is true, they could not have had any intent with regard to it. Reliance on specific intent is not compatible with denial of any intent. We believe that the search should be for general intent rather than for a supposed, but unexpressed, specific intent. General intent should be discovered not by defining and redefining the terms used but by considering the purposes of the grant in terms of enjoyment of the rights created. See Comment—New Values Under Old Oil and Gas Leases: Helium Who Owns It? 62 Mich. L. Rev. 1158, 1169.

The landowners desired to profit by the production of gas from their lands. To attain this end they gave exclu-

sive leases permitting exploration, development, production and marketing. The lessees drilled the wells and found gas. The gas came from the ground with all of its components and was measured at the wellhead. The gas was produced as a whole without separation of any of the components. Wellhead separation of helium was impractical.

In Utilities Production Corporation v. Carter Oil Co., 10 Cir., 72 F. 2d 655, 659, a case concerning the right of an oil lessee to use residue gas for repressurization, we said that the argument that lease parties contemplated the use of gas "for such methods of operation and development as were known to the industry the day the leases were signed * * *" was specious, and that a "foresighted intent cannot be imputed to the parties, for they knew that improvements would come about during the terms of the leases, and must have contemplated the use of such improved methods." We believe that those principles apply here. It is true that we are dealing with a new use of a component of the gas rather than an improved method of production but we are aware of no reason why the result should be different.

In the final analysis, the effort of the landowners is to write into the leases an exception or reservation which is not found in the executed instruments. They seek to except from the leases the helium which they cannot produce themselves. The only way to obtain value for the helium is to produce it, together with all other components of the gas, and run the gas through a separator. We will not import into the grants of oil and gas a subjective intent to convey only those components of the gas which comport to a subjective notion of the commercial end uses at the time of lease execution.

In our opinion general intent is closer to original intent than is specific intent which blossoms when a component previously regarded as an impurity becomes valuable. The discovery of the use and value of a component does not

expand the grant but the expansion of that discovery into tangible value makes more certain the specific object of the general grant. We conclude that, absent specific reservations, the grant of gas by the leases covered all components of the gas, including helium.

In the interpleader actions the landowners have asserted alternative in personam cross-claims against the producers based on abandonment and an alleged breach of the covenant to market. The lessee-producers say that the court does not have jurisdiction of such claims, that abandonment is not present because neither intentional nor voluntary relinquishment of the leases has been shown, and that no breach of the covenant has occurred because after the market developed in 1962 they diligently pursued their rights to payment for the helium content. Interpleader jurisdiction is limited to the fund in controversy. Here the fund is the money paid and to be paid to the interpleading plaintiffs for the helium-gas mixture produced and sold by them. The cross-claims have no relation to that fund. Hence, jurisdiction is not established. See State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533-537, and Knoll v. Socony Mobil Oil Co., 10 Cir., 369 F. 2d 425, 429, cert. denied 386 U.S. 977.

The Tort Claims case, based on conversion, and the Tucker Act case, based on reverse condemnation, are each dependent on the theory that the landowners have not parted with title to the helium. Our holding that the leases grant the helium removes the essential basis for each case and requires affirmance of the district court's dismissal of each.

2. Lessee-Producers' Claims.

The lessee-producers have drilled the wells, produced the gas, and sold it to interstate pipelines whose Helex subsidiaries separate helium from many other components and deliver the resulting mixture to the Bureau of Mines for further refinement. The named lessee-producers rep-

resent a class of well over 500 oil and gas operators. The lessee-producers say that they are entitled to recover out of the interpleaded funds the reasonable value of the commingled helium. They concede that they must pay royalty to the landowners on any amounts so received. The trial court held that the Helex companies have no liability to the lessee-producers.

The parties stipulated that helium-bearing natural gas delivered to the Helex companies is gas purchased and transmitted for resale in interstate commerce, that all gas purchase contracts between the lessee-producers and the pipelines are filed with the Federal Power Commission (FPC) as rate schedules under the Natural Gas Act, and that all payments made by the pipelines to the lessee-producers are at rates established, or permitted to be paid, by FPC.

The Natural Gas Act of 1938, 52 Stat. 821-833, 15 U.S.C. §§ 717-717w, placed the pipelines under FPC jurisdiction. In 1954 by its decision in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, the Supreme Court held that independent producers[4] are natural gas companies within the meaning of the Natural Gas Act and subject to FPC jurisdiction. The lessee-producers are independent producers.

The Natural Gas Act provides that all rates and charges of natural gas companies "shall be just and reasonable." See 15 U.S.C. § 717c(a). After the Phillips decision, FPC required independent producers to file their contracts with the pipelines and the contract price was accepted subject to FPC review.

FPC regulation of the pipelines has been on a conventional, cost-of-service, public utility basis which was found

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[4] FPC regulations, 18 CFR § 154.91(a) (1969), define independent producer as "any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who sells natural gas in interstate commerce for resale, but who is not engaged in the transportation of natural gas (other than gathering) by pipeline in interstate commerce."

undesirable in application to the independent producers. In its CATCO decision, Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, the Supreme Court directed the FPC, in protection of the public interest, to hold the line on rate increases. Responsive thereto, the FPC established in-line rates on an area basis. These rates are specified in FPC Statement of General Policy No. 61-1, issued September 28, 1960. See 18 CFR § 2.56 and amendments thereto. The effect thereof is that FPC will not certificate initial rates, and will suspend increased rates, which exceed the prescribed levels. The service rates fixed for Hugoton were 11¢ per Mcf. FPC area rate making was upheld by the Supreme Court in Permian Basin Area Rate Cases, 390 U.S. 747. The record shows that in Area Rate Proceeding, et al. (Hugoton-Anadarko Area), Docket No. AR 64-1, the presiding examiner's decision, which we are told at argument has been approved by the FPC so far as pertinent here, fixed the service rates for wellhead deliveries in the Hugoton area at 12.1¢ in the Texas panhandle, 11.9¢ in the Oklahoma panhandle, and 11.3¢ in Kansas. The Helex group and the United States say in effect that these service rates fix the prices which the lessee-producers can receive from the pipelines for Hugoton gas, including its helium content.

The 1960 Helium Act Amendments authorized the Secretary of the Interior to make long-term contracts, not exceeding twenty-five years, for the acquisition, processing, transportation, and conservation of helium. The Bureau of Mines negotiated with pipelines controlling large volumes of helium-bearing gas. In 1961, contracts were made with Northern, Cities Service, and National, all of which are interpleader plaintiffs. Another contract later that year was made with Phillips Petroleum Company which is not an interpleader plaintiff but which was joined by the government as a third-party defendant in the landowners' Tort Claims and Tucker Act suits. Phillips was also brought in as a lessee-producer in two interpleaders but disclaimed any interest in the fund. See 292 F. Supp. 629,

631-632. The Cities Service, Northern, and National extraction plants are all in Kansas. The Phillips plants are in Texas.

The contracts call for the construction of plants requiring capital investments of millions of dollars. The separation of helium from natural gas is accomplished by an expensive and complicated process whereby the gas is put under high pressure and is cooled to extreme temperatures. The other constituents of the gas liquefy and separate, leaving the helium and smaller quantities of other constituents as the remaining gas. The crude helium-gas mixture is defined in the contracts as "the gaseous product resulting from the helium extraction process . . . [and] comprised of helium predominately together with other constituents of the natural gas." In actual operations the delivered gas mixture is about 70% helium and 30% nitrogen. The gas mixture is transmitted by a government pipeline to the Cliffside, Texas, underground storage reservoir. When needed it is withdrawn and refined prior to sale to about 99.99% purity.

The contract prices apply only to volumes of contained helium. The initial prices, all subject to escalation, are $11.24 per Mcf for Northern Helex, $11.74 for Cities Service Helex, $11.78 for National Helium, and $10.30 for Phillips Petroleum. Under each contract the United States is obligated to purchase the total helium production for 22 years limited to stated annual dollar maximum amounts which are $9,500,000 in the Northern Helex contract, $9,100,000 in the Cities Service contract, $15,200,000 in the National Helium contract, and $13,700,000 in the Phillips contract. The refined helium is sold to both federal and non-federal users at $35 per Mcf, a price set by the Secretary of the Interior pursuant to the 1960 amendments.

The trial below was restricted to the issue of liability and no determination was made of the value of the helium-bearing gas. The court did point out that in the 1958 contract between the government and Colorado Interstate Gas

Company for the Keyes plant "the contract requires that the United States pay the company $2.00 for the right to process sufficient gas to yield one thousand cubic feet of helium." 292 F.Supp. at 652. The evidence shows that in arriving at the unit prices in the Helex contracts the government negotiated "on the basis of costs comparable to those it would incur in a government-owned plant * * * ." Ibid at 657. Included in the cost build-up was a payment of $2 per Mcf for helium "contained in natural gas delivered at the extraction plant for processing." Ibid. We express no opinion as to what such value actually is. For the purpose of this opinion, it is enough to say that recognition of helium value in the volumes of gas processed in the plants results in a price substantially higher than the FPC service rate.

The typical contract between a lessee-producer and a pipeline contains a recital clause, a definition of gas, a dedication of described acreage, reservations if any, a statement of quantities, pricing provisions in terms of Mcf ordinarily with escalation, arbitration, or negotiation provisions, quality standards based on Btu content and impurities, statement of duration of contract, methods of measurement, billing and payment procedures, and warranties of title. The trial court's analysis of these contracts need not be repeated here. See 292 F.Supp. at 669-672.

The lessee-producers say that gas and natural gas as used in the contracts mean gaseous hydrocarbons and hence do not include helium. They rely on definitions found in Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 8 Cir., 359 F.2d 675, 680-684, and Deep South Oil Company of Texas v. Federal Power Commission, 5 Cir., 247 F.2d 882, 888, and on various governmental publications and bulletins. The trial court, after referring to conflicting testimony of industry uses, found that no such usage existed and commented that no gas naturally occurring in the Hugoton area consists solely of hydrocarbons. See 292 F.Supp. at 672-673. We are bound by this finding because

it is supported by substantial evidence and is not clearly erroneous.

Relying on the quality clauses calling for Btu adjustments, the lessee-producers argue that the pipelines purchased not natural gas but energy and that the energy is derived solely from hydrocarbons. The effect of these adjustments is emphasized in the separate brief of Pan American Petroleum Corporation which has a contract with Cities Service covering approximately 600,000 acres and 725 wells. Certain of the gas is unmerchantable unless mixed with other gas. Pan American says in substance that it is penalized by the price reduction and then Cities Service uses helium, one of the components causing the reduction, to make a profit.

In Permian Basin Area Rate Cases, 390 U.S. 747, 809-813, the Court approved quality adjustments dependent on Btu content. In our opinion provisions for such adjustments do not convert the contracts into sales of energy. The contracts provide for the sale and purchase of gas on a volumetric basis. The district court was correct in holding that "the plain language of contracts providing for the purchase of *gas*" controls. See 292 F.Supp. at 676.

This brings us to what we consider to be the decisive point. Helium, a commodity not regulated in price, is produced as a component of natural gas which is price-regulated. The problem is whether the FPC service rate for natural gas includes the contained helium.

There can be no doubt of the power and duty of FPC to regulate the price of natural gas transmitted interstate for resale. The objective of such regulation is the protection of the consumer. The FPC has no interest in the components of the gas other than the effect which they may have on its quality as a fuel. The Bureau of Mines is concerned with prevention of helium waste which occurs when the gas consumers vent it into the atmosphere with fuel combustion residue.

Section 15 of the 1960 Helium Act Amendments, 50 U.S.C. § 167m, declares the purposes of the statute to be the encouragement of individual enterprise in the development of helium and the assurance of a sustained supply of helium for governmental activities. The Secretary of Interior is authorized to make long-term contracts for the acquisition, processing, and conservation of helium. He has the eminent-domain power to acquire the helium in helium-bearing natural gas. A new basis is provided for establishing the price of helium. The owners of helium extraction plants may not sell to a private purchaser at a price lower than that paid by a government agency. The licensing of private sales is under regulations made by the Secretary. Appropriate provisions are made for financing the program.

The argument centers around § 11, 50 U.S.C. § 167i.[5] This says that the Natural Gas Act does not apply "to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled." It also provides that in the determination of rates of a natural gas company there shall be excluded (1) all income from helium, (2) all direct costs in the extraction, processing,

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[5] This section reads in its entirety:

"The provisions of the Natural Gas Act of June 21, 1938 (52 Stat. 821; 15 U.S.C. 717-717w), as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 4 and 5 of the Natural Gas Act, as amended, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis."

transportation, and storage of helium, and (3) the portion of joint costs allocated to helium "on a volumetric basis."

Senate Report No. 1814, 2 U.S. Cong. & Adm. News '60, pp. 3595, 3599, succinctly states the purpose of this section.

> "Section 11 covers the jurisdiction of the Federal Power Commission in this area. The section makes it clear that the Federal Power Commission retains its jurisdiction over natural gas containing helium but has no jurisdiction over helium itself."

Other legislative history confirms this purpose.[6]

The only decided case concerning § 11 is Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 8 Cir., 359 F.2d 675. Panhandle applied to FPC for a certificate to use its pipeline system to transport gas to the National helium plant. The court said that plant shrinkage of the gas stream consisted of fuel gas, helium, liquefied hydrocarbons, and purge. FPC ordered Panhandle to amend its application to cover hydrocarbons which were liquefied and sold as well as the fuel gas. Panhandle sought court review and urged that the FPC order violated § 11. The court held that it did not and sustained the order on the basis that it applied only to the transportation of hydrocarbons, not helium. The court reviewed the legislative history of § 11 and concluded that FPC had no jurisdiction over the helium either while commingled or after extraction and that such exemption does not prevent FPC from exercising jurisdiction over helium-bearing gas. Ibid at 679.

The trial court in the case at bar concluded that § 11 does not alter the scope of the gas purchase contracts and

> " • • • does not *require* that persons contracting for the sale of gas contract separately for the sale of

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[6] See House Report No. 1552, 88th Congress. Debates in the House and Senate are found in 106 Cong. Rec. pages 9089-9095, 15119-15125, 18536-18538, 18544-18546, 18602-18609, 18902-18904. These appear in the trial record as Helex Ex. 281.

the helium constituent. It merely permits them to do so, and when they have not, the contract must stand as it is written." 292 F.Supp. at 680.

On the record presented, the denial to the lessee-producers of any recourse under the non-applicability clause of § 11 is startling. The evidence is convincing that 99% of the nation's recoverable helium supply is in the Hugoton area, that this area was about 95% developed before the 1960 amendments, and that, with insignificant exceptions, the controlling contracts had been executed long before 1960. The effect of the trial court's decision is to deny application of § 11 to the facts presented. We find nothing in the legislative history, and our attention is directed to nothing therein, which shows a congressional intent to deprive the lessee-producers of all benefit from the enhanced helium value, to deny the landowners royalty on the increased value of the gas produced from their lands, or to permit the pipelines to retain all profit from the helium value by obtaining the commingled helium at the FPC service rate.

The issue must be determined in the context in which it is presented. "The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas.' CATCO, Atlantic Refining Co. v. Public Service Commission of N.Y., 360 U.S. at 388, 79 S. Ct. at 1253. The Helium Act Amendments are designed to assure a sustained suppy of helium for governmental and industrial needs. The Natural Gas Act and the Helium Act Amendments must, if possible, be reconciled to produce a "symmetrical whole." Panhandle Eastern Pipe Line Company v. Federal Power Commission, 8 Cir., 359 F.2d 675, 679.

Some incidental matters must be mentioned. Section 2(3) of the 1960 amendments, 50 U.S.C. § 167(3), defines "helium-bearing natural gas" and "helium-gas mixture" to mean respectively, "natural gas and gas mixtures containing three-tenths of 1 per centum or more of helium by volume." We find no pertinency in this because § 11, which

relates to the applicability of the Natural Gas Act, uses neither phrase.

Section 5(a), 50 U.S.C. § 167c(a), authorizes regulations for licensing sales and transportation of helium and says that:

> "For the purpose of this section, the term 'helium' shall mean helium, after extraction from helium-bearing natural gas or helium-gas mixtures, in a refined or semirefined state suitable for use."

Section 5 has nothing to do with § 11. To read its definition of helium into § 11 would be to delete the words "prior to" from § 11 and the words "For the purpose of this section" from § 5.

The lessee-producers point out the familiar and common statement of the FPC in its rate orders that it is "acting pursuant to the authority granted by the Natural Gas Act." See e.g. Order No. 264, 29 F.P.C 589. This is a statement of the statutory justification of the action taken. We find it of no pertinence in the reconciliation of the two statutes.

Section 11, after stating the nonapplicability of the Natural Gas Act, excludes from consideration in FPC rate determination all income from sale of helium, all direct costs pertaining to helium, and a portion of the indirect costs allocated to helium on a volumetric basis. In our opinion the purpose of these provisions is to encourage private participation in the helium program by assurance that rate of return will not be determined by conventional FPC standards. The statute furnishes a profit incentive. The mentioned provisions do not detract from the preceding clause of § 11 declaring the nonapplicability of the Natural Gas Act. We find nothing in the record which indicates any use of the exclusions which would have effect on the construction of § 11.

The situation is that a nonregulated commodity (helium) is necessarily produced in conjunction with a regulated commodity (natural gas). The Helex companies insist that the price for the regulated commodity includes the non-

regulated commodity. The lessee-producers emphasize the rule of rate regulation that there can be no deviation from the lawful rate for a regulated commodity or service. See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, and Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246. They point to several decisions which hold that the furnishing of services was an improper deviation from ICC rates. See United States v. Wabash R. R. Co., 321 U.S. 403 (spotting freight cars in plant yard); Baltimore & Ohio R. R. Co. v. United States, 305 U.S. 507 (in-transit warehousing at less than cost); and Lowden v. Simonds-Shields-Londale Grain Co., 306 U.S. 516 (installation without charge of grain doors in freight cars). The lessee-producers equate the nonpayment for the helium content of the gas with the noncollection of paid costs in the railroad rebate cases.

In answer the Helex companies say that under the Natural Gas Act the FPC fixes ceiling prices and does not impose a flat rate. Although this is true, the ceiling rate, or the lower filed rate, is the lawful rate and there may be no deviation therefrom. See Western Union Telegraph Co. v. Esteve Brothers & Co., 256 U.S. 566, 571. Section 4(b) of the Natural Gas Act, 15 U.S.C. § 717c(b), forbids "any undue preference or advantage" to any person.

The Helex companies deny any prejudice or disadvantage. They say that the lessee-producers contracted to deliver the gas stream in its entirety and, absent an express reservation, the buyer gets the whole stream for such purposes as it may determine. The premise ignores the effect of the Natural Gas Act. Although the Act does not abrogate private rate contracts as such, see United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 338, it makes fundamental changes in those contracts. The rate must be just and reasonable and, if it is not, the FPC changes it. Provisions for price escalation or price changes by arbitration or renegotiation are rendered ineffective by regulations permitting summary rejection of increased rates based thereon. See Federal Power Commission v. Texaco, Inc., 377 U.S. 33. Contract provisions for period

of duration are overriden by unlimited certificates, see Sunray Mid-Continent Oil Co. v. Federal Power Commission, 364 U.S. 137, 156, with the result that the grant of a certificate carries with it a dedication of the gas for the life of the field unless FPC approves withdrawal. Although the contracts are not abrogated, their provisions on price and term are superseded by FPC regulation.

The basis of the Helex companies' argument is that there is a contract sale of commingled helium when it is sold as a component of the gas stream under FPC service rates. We are not persuaded. The protection of the Natural Gas Act is for the consumers, not the Helex companies.

In § 11 of the 1960 Helium Act Amendments, Congress has said that the Natural Gas Act is not applicable to helium operations "either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled." In our opinion this means what it says and, if the Natural Gas Act does not apply, a service rate fixed thereunder does not apply to sales of contained helium.

The Helex companies read into § 11 a distinction between the sale of helium as a separate commodity and by a separate agreement and a sale of helium as a component of the gas stream. They argue that there may be an additional payment for helium in the first instance but not in the second. A sale of the commingled helium as a component of the gas stream is a sale of helium "prior to * * * the separation of such helium from the natural gas with which it is commingled." Accordingly, the Natural Gas Act, and the FPC fixed service rates, do not apply.

In oral argument, but not in briefs, the Helex companies say that if title to the helium passes under the contracts, interpleader jurisdiction does not lie to permit recovery by the lessee-producers, and they rely on State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533-537, and Knoll v. Socony Mobil Oil Co., 10 Cir., 369 F.2d 425, 429, cert. denied 386 U.S. 977. The interpleaded fund is the money paid and to be paid by the United States to the Helex com-

panies for the helium gas mixture. The lessee-producers claim a part of that fund on the ground that they have not been paid for the helium content of the gas. In our opinion this is a claim to the fund and is within interpleader jurisdiction. The situation is not changed by the fact that the claim covers only a part of the fund or by the fact that volume, and hence value, is measured at the delivery point. The situation is different from that confronting us in connection with the landowners' claims against the lessee-producers on the grounds of failure to market and abandonment. Those claims have no relation to the fund.

The lessee-producers argue that they are entitled to payment of the reasonable value of the helium under equitable principles of quantum meruit and unjust enrichment arising out of mistake. They emphasize the enormity of the mistake by saying that under the three contracts in the interpleaders a total of $743,600,000 will be paid for crude helium in a 22-year period and claim that $125,000,000 of that, as a bare minimum, represents the value of commingled helium before extraction. They contrast this with the negative or de minimis value which the parties mistakenly assumed it would be.

The Helex companies insist that the equities favor them. They say that they built the multi-million dollar extraction plants and assumed the necessary risks. They charge that the lessee-producers stood idly by while the risks were taken, the money invested, and the work done by others. In support of the principle that equity does not take from those who earn it and reward those who silently stand aside and await the success of the enterprise, they cite the refreshing authority found in the folk-tale of the Little Red Hen.[7]

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[7] As quoted in the brief of the Helex companies: "You remember that I planted the wheat and cut it, I threshed it and carried it to mill, I made the bread and baked it—and now all of you would help me eat it! No, indeed." See V. S. Hutchinson, Chimney Corner Stories (1925) 63, 65, published by Minton Balch and Company, New York.

The lessee-producers answer that, if the remarks of the Little Red Hen are codified as a principle of equity, they are supported thereby because they obtained leases and conducted drilling, production, and delivery operations which placed the commingled helium into the hands of the Helex companies.

The activities of the Little Red Hen were not those of a public utility, and neither the product nor the ingredients thereof were subject to governmental rate regulation. Therein lies the difference. In our opinion private contract law and the principles applicable thereto are not controlling. This makes it unnecessary for us to delve into the many cases and texts bearing on the respective rights of parties to private contracts.

Common provisions of the gas purchase contracts call for periodic price escalation, arbitration or renegotiation. These provisions have been largely nullified by FPC regulations. The situation is illustrated by the plight of Ashland Oil & Refining Company which sells to Cities Service gas from over 100 Hugoton wells. The 1948 contract has a special price arbitration provision operative on 5-year periods. In 1961 the rate was raised to 12¢ plus 1.75¢ for gathering. In the 1966 negotiations for a new price Ashland offered to accept a price applicable to natural gas under FPC jurisdiction plus a separate price for non-jurisdictional helium. Cities Service insisted on a single price because the contract did not provide for dual price structure. The matter went to arbitration under an agreement to include helium in the arbitrated price. The arbitrator fixed a price of 15¢ plus 1.75¢ for gathering. FPC suspended the rate and after suspension it went into effect subject to refund with interest. The Hugoton-Anadarko area rate proceeding fixed a price of 11.3¢ for non-gathered and 13.2¢ for gathered natural gas. The result shows the inability of a lessee-producer to use a price arbitration provision to secure payment for helium content of natural gas.

The trouble lies in the statutory jurisdiction of the FPC on the one hand and of the Department of the Interior, acting through the Bureau of Mines, on the other. The FPC has jurisdiction over natural gas produced, sold and transmitted interstate for resale. It has no jurisdiction over the price of helium. Phillips Petroleum Company v. Ashland Oil & Refining Company, 40 F.P.C. 390, 391-392. The Bureau of Mines has jurisdiction over the conservation of helium. It has no statutory power to fix the value of the contained helium delivered to the pipelines and their affiliates. In 1960 the greatest helium waste was by FPC protected consumers who vented the helium with fuel combustion residues. The FPC seeks to obtain the objectives of the Natural Gas Act through rate control, one aspect of which is the negation of price increase clauses. The lessee-producers cannot secure any increased value from FPC for the helium content of the gas which they produce and sell.

The lessee-producers fall into the void created by the two statutes. Neither the FPC nor the Bureau of Mines has jurisdiction over the helium value of the natural gas. Although the gas purchase contracts have not been abrogated, the price provisions thereof have been superseded by FPC rate regulation. The regulated lessee-producers must continue to sell the dedicated gas and have no statutory or contractual method of obtaining any benefit for the increased value. Two results are possible. The first is that the lessee-producers must deliver the gas at the FPC service rate, based on fuel value, and receive nothing for the helium value. This produces a windfall for the pipelines and their Helex subsidiaries. The second is that the lessee-producers are entitled to the reasonable value of the contained helium. This means that the landowners will receive royalties on the value of the helium produced from their lands and the lessee-producers will receive value for the helium content of the natural gas which has been produced by their efforts. We believe that satis-

factory utility regulation requires the second result. Otherwise, a utility rate may be used to obtain a commodity or service which is not within the contemplation of that rate.

The allowance of a price, above the FPC service rate, for the helium content of Hugoton natural gas, does not adversely effect gas consumers. Their rights to just and reasonable rates are still protected by the Natural Gas Act and the FPC and are not increased by either recognition or payment of helium values.

In our opinion the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants. Hence, the lessee-producers recover from the fund the reasonable value of the helium content of the processed gas and they in turn must pay royalty thereon to the landowners. We believe that this result is a valid reconciliation of the statutes and a proper determination of the rights of the parties.

Our conclusion that payment is required relates only to the helium content of the processed gas. The record shows that only about 44% of the produced gas goes through the separation plants. We do not intend that payment to the lessee-producers or royalties to the landowners should include anything for the helium content of the nonprocessed gas. The record does not show any market for the helium commingled with the nonprocessed gas.

The reliance of the Helex companies on the warranty of title provisions of the gas purchase contracts does not impress us. The claim of the lessee-producers is that the Helex companies have received the gas without paying for the helium content. In ordinary circumstances restitution or rescission might be an available remedy. Here, neither is practical or legally possible, but when payment is

required and not made, the title fails just as surely as it does where either restitution or rescission is appropriate.

The Helex companies urge that the helium content cannot be traced back to the delivery points. The landowners and lessee-producers disagree. On the state of the record we reject the position of the Helex companies. The helium content can be measured at the location of the orifice meters which determine the volumes. The lessee-producers seem to have no difficulty in determining volumes as a basis for royalty payments. Our attention is directed to nothing which makes the determination of the helium content either difficult or impossible.

One issue remains. The trial court assessed the costs, including attorneys' fees, against the fund. Such costs are estimated to be between a million and a million and a half dollars. The Helex companies say that such assessment of costs violates the principles stated in Hobbs v. McLean, 117 U.S. 567, 582. Our disposition of the case makes necessary reconsideration of the cost issue by the trial court. We express no opinion with regard thereto.

In No. W-3009, the Tort Claims action, and in No. W-3159, the Tucker Act action, the judgments are severally affirmed.

In the interpleader actions, the judgments are severally reversed and the cases remanded to the district court for further consideration in the light of this opinion.

The assessment of costs on these appeals is subject to future court action. The court notes that the 88 appeals have been presented and determined on a consolidated record. Within 14 days from the filing of this opinion, or such further time as the court may allow, the parties shall present their itemized and verified bills of costs, if any, and whatever statements they may care to make in regard to the division and assessment of costs.

APPENDIX B

Opinion of the United States District Court for the District of Kansas, Dated September 7, 1968 (292 F.Supp. 619)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. KC-1969 (and Consolidated Civil Actions, Nos. KC-1945, KC-1946, KC-1947, KC-1948, KC-1980, W-3009, and W-3159)

NORTHERN NATURAL GAS COMPANY, ET AL., *Plaintiffs*,

v.

RALPH GROUNDS, HENRY HITCH, ET AL., *Defendants*.

MEMORANDUM
FINDINGS OF FACT AND CONCLUSIONS OF LAW

NATURE OF ACTIONS

These eight consolidated civil actions come before the Court following a protracted trail for findings of fact and conclusions of law with respect to the issues relating to liability. Six of the cases are actions in the nature of interpleader. Two of the actions are for conversion and reverse condemnation.

All of these actions involve the ownership of helium[1]

[1] Helium is a colorless, odorless, and inert gas. It is the second lightest substance, second only to hydrogen. It can be liquefied only at —452.1°F., nearly absolute zero. It will not react chemically or physically with any other elements [LPX 5, p. 10; LPX 19, p.13; LPX 221, p. 431; LOX 792, Tr. 8:583-599].

References to testimony are designated by the volume numbers and pages of the Transcript. References to exhibits presented on behalf of the pipeline companies, the Helex companies, and the United States are designated as "Helex Ex."; the landowner exhibits are designated "LOX", and the lessee-producer exhibits are designated "LPX". Exhibits of individual lessee-producer exhibits are designated by company name, i.e. "Mobil Ex.—", etc.

contained in or extracted from natural gas[3] and produced from wells drilled in the Chase Group of the Permian formation of the Hugoton gas area in Kansas, Oklahoma, and Texas. Helium-bearing natural gas is produced from these lands by producers operating under leases granted by landowners and other owners of mineral interests in these lands. This helium-bearing natural gas is then sold by these producers to pipeline companies, who, generally speaking, transport this gas for resale for industrial and consumer use through the mid-Continental United States. In the early 1960's, pursuant to a helium conservation program approved by the Congress and implemented by the Bureau of Mines and the Department of Interior, four companies contracted to sell helium to the United States. The companies proposed to extract this helium from gas in helium processing plants built on or near large volume pipelines. The United States agreed to purchase from each company all the extracted helium up to a contract dollar maximum ranging from nine to 15 million dollars a year. From these purchases, the United States supplies its current demands, as well as builds a conserved supply in a Texas storage reservoir.

The fund involved in each interpleader suit is the money paid and to be paid by the United States to the interpleading plaintiffs for the helium-gas mixture produced and sold by them. The claimants to the fund may be grouped, generally speaking, into three classes, referred to collectively herein as the "landowners," the "lessee-producers," and the "helex group," which includes the helium extraction and their parent pipeline companies. The landowners claim, in brief, that helium did not pass to their lessees under the oil and gas, or merely gas, leases by virtue of which natural gas has been and is being produced from their properties.

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[3] We use the term "natural gas" to mean (the condition of) the "aeriform fluid" at the time that it emerges from the wellhead regardless of its composition.

The lessee-producers oppose this position, assert that helium did in fact pass under those leases, but that it passed no further, i.e., that it did not pass to the pipeline companies under the gas purchase contracts under which lessee producers deliver natural gas from the lands in question. The helex group, comprising three pipeline companies and their subsidiary or parent companies, and Phillips Petroleum Company each assert that helium did in fact pass under the oil and gas leases to the lessee-producer, that it passed further, under the gas purchase contracts, and that it was theirs to separate out from the natural gas stream in their possession and sell to the United States. The United States concurs in this position.

In the course of our preparation of Findings of Fact and Conclusions of Law we have reviewed and disposed of the motions to which the parties have taken exception in the light of the evidence before us.

The Parties

Identification of the parties to these actions and statement of their positions will clarify our views. The parties in the interpleader suits, KC-1945, KC-1946, KC-1947, KC-1948, KC-1969, and KC-1980 all claim ownership of or an interest in the interpleaded fund in the particular case.

KC-1945.

Cities Service Gas Company was the original interpleading plaintiff in Cases KC-1945, KC-1948. It was subsequently joined, however, by Cities Service Helex, Inc., and Cities Service Cryogenics, Inc., (formerly Cities Service Helium, Inc.), both wholly owned subsidiaries of Cities Service Company, which holds, also, upwards of 79 per cent of the stock of Cities Service Gas Company. These plaintiff corporations are organized under the laws of the State of Delaware and have principal places of business in Oklahoma.

It is necessary to state the contractual relationships between the three parties plaintiff. In brief, Cities Service Gas Company conveyed to Cities Service Helium by contract executed August 17, 1961, "for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable considerations" the right to all helium contained in gas purchased by it and gathered to a central point adjacent to its Grant County, Kansas compressor station, together with the right to extract such helium.[4] Cities Service Helium in turn, by contract dated the following day, August 18, 1961, conveyed these helium rights to Cities Service Helex, Inc., which agreed to pay therefor 1.35 cents for each thousand cubic feet (Mcf) of gas delivered to Cities Service Helex for helium processing.[5] Shortly thereafter, on August 22, 1961, Cities Service Helex contracted to sell helium to the United States.[6]

Cities Service Helex contracted with the Cities Service Gas Company, on September 11, 1961, for the purchase of gas required for operation of its helium extraction plant, and agreed to sell to the Cities Service Oil Company the crude liquid hydrocarbons recovered in the helium extraction process.[8] Cities Service Gas Company is referred to as "Cities."

The named defendant individuals, O. W. Heger, Almeta Redfield, et al., appear individually and as representatives of a landowner class consisting of

> ". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, is being or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being or will be taken

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[4] LPX 150.

[5] LPX 151.

[6] LPX 106.

[8] LPX 152; LOX 508.

into the possession by the United States of America in Grant County, Kansas, at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader Cities Service Helex, Inc., dated August 22, 1961.'"[7]

The named defendant lessee-producer is Mobil Oil Corporation (formerly Socony Mobil Oil Company), a corporation organized under the laws of the State of New York, with its principal place of business there. Mobil appears both individually and as representative of a lessee-producer class, which

". . . consists of the persons, firms and corporations denominated 'lessee-producers,' who are the owners of leasehold interests in . . . oil and gas leases [described in the foregoing paragraph] . . ., and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Cities Service Gas Company, which helium has been, is being, and will be removed and delivered by plaintiff in interpleader, Cities Service Helex, Inc., into the possession of the United States of America at the delivery point described in that certain contract between the United States of America and Cities Service Helex, Inc., dated August 22, 1961."[8]

Cities purchases gas from Mobil pursuant to at least four contracts which are filed as rate schedules of Mobil with the Federal Power Commission.[9] Whether gas delivered under all of these contracts is processed for helium does not clearly appear.[10] Representative lease forms under

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[7] Dkt. 1135, KC-1969. In the documentation of the finding "Dkt. ——" followed by case number refers to the docket sheet prepared by the Clerk of the Court for each case; however, after consolidation most pleadings were filed in KC-1969, as the Consolidated file.

[8] Ibid.

[9] Mobil Exs. 11, 12, 13 and 14, being FPC Schedule No. 3, 89, 261 and 262.

[10] Tr. 34:3482-83.

which Mobil produces gas for sale to Cities are in evidence.[11]

KC-1946.

The plaintiffs are identical with those in the preceding case. The named individual defendants, Vivian W. Schuett, R. J. Stuckey, et al., appear both individually and as representatives of the class of landowners and owners of mineral interests as defined in the preceding case. The named defendant lessee-producer is the Ashland Oil and Gas Company, a corporation organized and existing under the laws of the Commonwealth of Kentucky, with its principal place of business in that state. Ashland appears both individually and as representative of the same class of leasehold interest owners as defined in the preceding case, KC-1945.

Ashland produces gas from a block of 119 wells located principally in Grant and Haskell counties, Kansas, and delivers it through an approximately 150-mile gathering system to Cities at a point near the helium extraction plant operated by Cities Service Helex, Inc., in Grant County, Kansas. Representative forms of these leases under which gas is produced for this sale are compiled in Ashland Exhibit 1. These leases were acquired by Ashland on March 1, 1963, from the United Carbon Company, parent of United Producing Company, a previous owner thereof.[12]

The contract under which Ashland delivers gas to Cities was executed originally on March 12, 1948, by United Producing Company, which agreed therein to deliver natural gas to Cities so long as it could be produced from the subject leaseholds in commercial quantities.[13] On October 1, 1954, this contract was filed with the Federal Power Commission as United's FPC Rate Schedule No. 111, and

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[11] Mobil Ex. 1; Dkt. 217, KC-1969.

[12] Ashland Ex. 18-20.

[13] Ashland Ex. 5.

upon acquisition of the leaseholds by Ashland, and FPC approval of the transfer, it became Ashland's FPC Rate Schedule No. 111. Ashland also succeeded to a second gas purchase contract with Cities executed August, 1953, by United now being Ashland's FPC Rate Schedule No. 112. Gas delivered under this contract is not processed for the separation of helium, however.[14]

KC-1947.

The plaintiffs are identical with those in each of the preceding cases. The named defendant individuals, Katherine R. Adams, J. H. McMorran, et al., appear individually and as representatives of the class of landowners and owners of mineral interests as defined in the first case, KC-1945. The named lessee-producer is Columbian Fuel Corporation organized under the laws of the State of Delaware, with its principal place of business in the State of New York. Columbian appears individually and as representative of the class of leasehold interest owners defined in the first case, KC-1945.

Columbian sells natural gas to Cities Service Gas under two contracts, executed November 18, 1949, and June 16, 1949.[15] These contracts are filed with the Federal Power Commission, and are included in Columbian's FPC Rate Schedule Nos. 7 and 37. Columbian delivers gas to Cities under a third contract, its FPC Rate Schedule No. 10, but gas delivered thereunder apparently is not processed for helium extraction.[16] Columbian delivers gas to Cities at the tailgate of Mobil's Hickok Plant in Grant County, Kansas.

KC-1948.

The plaintiffs are identical with those in each of the preceding cases. The named defendant individuals, Bloyd

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[14] Tr. 34:3461

[15] Columbian Exs. 8, 9.

[16] Columbian Ex. 10.

Burgess, John J. Cecil, et al., appear individually and as representatives of the class of landowners and owners of mineral interests as defined in the first case, KC-1945. The named defendant lessee-producer is the Pan American Petroleum Corporation, organized under the laws of the State of Delaware, with its principal place of business in the State of Oklahoma. Pan American appears individually and as representative of the class of leasehold interest holders as defined for the first case, KC-1945.

Pan American sells gas to Cities under a single contract executed June 23, 1950, by Stanolind Oil and Gas Company, Pan American's predecessor, the contract covering gas produced from approximately 400,000 to 600,000 acres in Kansas Hugoton Field so long as it can be had in commercial quantities. This contract as amended is included in Pan American's FPC Rate Schedule No. 84.[17] Copies of representatives lease forms under which this gas is produced are in evidenc .[18]

Since execution of this contract in 1950, Pan American has executed approximately 168 "farmout" agreements, by which it agreed to assign various leases covering areas dedicated under that contract, these agreements providing specifically that any production therefrom is subject to the Pan American—Cities contract. Under the standard farmout agreement, the farmout operator drills at his own expense, and upon completion of a commercial well, he becomes owner of the working interest and usually operates the well or arranges for its operation, the assignor retaining a royalty. These operators are independent producers who were required to obtain certificates of public convenience and necessity covering their sales to the Cities Service Gas Company. None of these operators was made a party to this action. By court order they fall within the

[17] Pan American Ex. 4.

[18] Pan American Ex. 1.

class of owners of leasehold interests represented by Pan American as a lessee-producer.[19]

KC-1969.

Plaintiffs in this interpleader action are Northern Natural Gas Company (Northern), an interstate pipeline company, and two wholly-owned subsidiaries, Northern Helex Company (formerly Helex, Inc.) and Northern Gas Products Company, all corporations organized under the laws of the State of Delaware, with their principal places of business in the State of Nebraska.

The named defendant individuals, Ralph Grounds, Henry Hitch, and approximately five hundred other named individuals, appear individually and as representatives of a class defined by the court as comprising

> ". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, is being or will be severed from the ground in connection with or because of production under oil and gas leases, which helium . . . is being or will be taken into the possession by the United States of America in Ellsworth County, Kansas at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader Northern Helex, Inc., (formerly Helex Company) dated August 15, 1961."[20]

Eight named lessee-producer companies are defendants in this action.

Ashland delivers natural gas to Northern under two contracts, executed August 25, 1943, and June 28, 1954, these are included in Ashland's FPC Rate Schedule Nos. 116 and 122, respectively.[21]

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[19] Page 13, infra.

[20] Dkt. 1135, KC-1969.

[21] Ashland Exs. 7, 10.

Cities Service Oil, a Delaware corporation with its principal place of business in the State of Oklahoma, delivers natural gas to Northern under eleven contracts, these being Cities Service Oil FPC Rate Schedule Nos. 53, 70, 89, 166-171, 190, and 191.[22]

Gulf Oil Corporation, a Pennsylvania corporation with its principal place of business there, delivers natural gas to Northern under a single contract, found in Gulf's FPC Rate Schedule No. 117.[23] Representative forms of leases under which this gas is produced are in evidence.[24]

Helmerich & Payne, Inc., is an Oklahoma corporation with its principal place of business in that state. It delivers natural gas to Northern under eight contracts, these being its FPC Rate Schedule Nos. 1, 2, 4-8.[25] Representative forms of leases under which gas is produced for delivery thereunder are also in evidence.[26]

Mapco Production Company, a Delaware corporation with its principal place of business in Oklahoma, delivers gas to Northern under one contract, dated September, 1949, and is Mapco FPC Rate Schedule No. 1, formerly Hugoton Plains FPC Schedule No. 1. Representative forms of leases under which gas is produced for delivery under this contract are in evidence.[27]

Mobil delivers gas to Northern under nine contracts, included in its FPC Rate Schedule Nos. 32, 71, 85, 158,

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[22] Cities Service Oil Ex. 7-16. Representative forms of leases under which gas is produced for delivery to both Northern and Panhandle Eastern Pipeline Company, a party to KC-1980, are assembled in Cities Service Oil Co. Ex. 17.

[23] Gulf Ex. 3.

[24] Gulf Exs. 1, 2; Dkt. 166, 920, KC-1969.

[25] Helmerich & Payne Exs. 3-9.

[26] Helmerich & Payne Exs. 1, 2; Dkt. 250, 1232, 1235, KC-1969.

[27] Mapco Ex. 1; Dkt. 255, KC-1969.

179, 281, 232, 284, and 326.[28] Representative forms of leases are in evidence.[29]

Texaco, a Delaware corporation with its principal place of business in states other than Kansas and Nebraska, delivers gas to Northern under fourteen contracts, these are included in Texaco FPC Rate Schedule Nos. 10, 11, 12, 71, 106-112, 129, 147 and 317. Representative lease forms under which gas is produced for these sales are in evidence.[30]

These named lessee-producers appear individually and as representatives of a class defined by the court as consisting of:

> ". . . the persons, firms and corporations denominated 'lessee-producers' who are the owners of leasehold interests in the oil and gas leases . . . [from which gas is produced for delivery to Northern Natural Gas Company] and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Northern Natural Gas Company, which helium has been, is being or will be removed and delivered by plaintiff in interpleader [Northern Helex, Inc.], into the possession of the United States of America at the delivery point described in that certain contract between the United States and [Northern Helex, Inc.], (formerly Helex Company), dated August 15, 1961."[31]

Phillips Petroleum Company, a Delaware corporation with its principal place of business in the State of Delaware, was named as an original defendant lessee-producer of gas. Phillips, however, makes no claim to the interpleaded fund, and urges that having disclaimed any in-

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[28] Mobil Exs. 2-9.

[29] Mobil Exs. 1, 1A.

[30] Texaco Exs. 1, 2; Dkt. 199, 1231, KC-1969 (Leases); Texaco Ex. 3-14, 17 and 33.

[31] Dkt. 1135, KC-1969.

terest in the subject matter of the action upon which the court's jurisdiction depends, it should be dismissed therefrom.

Counsel for landowners and Phillips disagree whether the landowners assert cross-claims against Phillips in KC-1969. After examination of the pleadings and pre-trial order, we find that landowners have asserted two cross-claims against Phillips; first, a denial that Phillips has any interest in the fund (which Phillips concedes) and secondly, on the premse that leases do cover helium, landowners seek damages from Phillips on the ground that as a lessee-producer, it has failed to market the helium portion of natural gas with reasonable diligence.

KC-1980.

The plaintiff in this interpleader action is National Helium Corporation, organized and existng under the laws of the State of Delaware, with its principal place of business in the State of Kansas.

The Panhandle Eastern Pipe Line Company, a Delaware corporation with its principal place of business in the State of Missouri, was made a party defendant by National Helium. Panhandle owns fifty per cent of the stock of National Helium, with National Chemical and Distillers Company owning the remaining fifty per cent.

No lessee-producer was named as an original defendant in this case. Eight named lessee-producers were first introduced into this case by a third-party complaint filed by defendant Panhandle,[22] wherein Panhandle sought judgment against the named third-party defendants "for all sums that may be adjudged against Panhandle *in favor of National Helium . . . or the landowners* with respect to gas purchased by Panhandle from, and delivered to Panhandle by such third-party defendants . . ." Prior to that time,

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[22] Dkt. 54, KC-1980.

landowners had filed counterclaims and crossclaims against National Helium and Panhandle respectively, seeking judgment for alleged conversion of helium. National Helium had never asserted any liability against Panhandle, however, so as to authorize a third-party complaint under Rule 14, F.R. Civ.P., which provides that a "defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him.*" [Emphasis supplied.]

The lessee-producers answered without objecting to improper joinder under Rule 14. They have tendered precisely the same issues for decision in KC-1980 as in the other interpleader cases where they were properly joined, and they have taken precisely the same positions in each of the interpleader cases. Had lessee-producers not asserted their claims to the fund in KC-1980, notwithstanding their third-party status, it would have been incumbent upon the court to join them as defendants under Rule 19, F.R. Civ.P. which provides, in pertinent part, that

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

It is clear that as a group, their presence was necessary to a full and complete adjudication of rights to the interpleaded fund. Failure to join them would have left a critical gap in the group of claimants necessary to complete determination of the ownership of helium, and the right to participate in the fund consisting of the proceeds from

its sale. We hold that the lessee-producers named in the third-party complaint are properly defendants, individually and as representatives of the class, and we deem them to have been joined under Rule 19. The named lessee-producer defendants are twelve in number.

Ashland delivers gas to Panhandle under eleven contracts, included in Ashland's FPC Rate Schedule Nos. 108, 109, 120, 121, 125, 135, 141, 142, 145, 148 and 177.[33]

Cabot Corporation, a Delaware corporation with its principal place of business in Massachusetts, delivers natural gas to Panhandle under eleven contracts, included in its FPC Rate Schedule Nos. 28, 35, 47, 69, 71, 41, 62, 75, 89, 33, and 66.[34]

Columbian delivers gas to Panhandle under seven contracts, these included in Columbian's FPC Rate Schedule Nos. 2, 31, 33, 36, 40, 75, and 136.[35]

The Shamrock Oil and Gas Corporation, since the commencement of this litigation, has become, as result of a merger, the Diamond Shamrock Corporation, and has been substituted therefor. It is a Delaware corporation, with its principal place of business in the State of Ohio. It delivers gas to Panhandle under four contracts, these included in Shamrock's FPC Rate Schedule Nos. 4, 24, 30, and 32.[36]

The Dorchester Gas Producing Company, a Delaware corporation with its principal place of business in the State of Texas, delivers gas to Panhandle under three agreements, two of which are gas exchange agreements, included in Dorchester's FPC Rate Schedule Nos. 4, 1 and 2.[37]

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[33] Ashland Exs. 3, 4, 8, 9, 11-17.

[34] Cabot Exs. 2-10, 13, 14.

[35] Cities Service Oil Exs. 1-6 (sic).

[36] Columbian Exs. 1-7 (sic).

[37] Dorchester Exs. 4, 5, 6.

Gulf delivers gas to Panhandle under eight contracts, being Gulf's FPC Rate Schedule Nos. 51, 68, 100, 167, 171, 200, 237, and 293.[38]

Helmerich & Payne, Inc. delivers gas to Panhandle under two gas purchase contracts, being Helmerich & Payne's FPC Rate Schedule Nos. 28 and 29.[39]

Mobil delivers gas to Panhandle under eleven contracts, being its FPC Rate Schedule Nos. 246, 223, 248, 299, 303, 11, 54, 385, 369, 301, and 245.[40]

Pan American delivers gas to Panhandle under eight contracts, being its FPC Rate Schedule Nos. 134, 194, 196, 221, 223, 276, 365, and 425.[41]

Texaco, Inc., delivers gas to Panhandle under twenty-two contracts, being its FPC Rate Schedule Nos. 142, 136, 152, 164, 171-173, 224, 230, 242, 244, 256, 289, 303, 304 309,, 315, 318, 344, 352, 353, and 367.[42]

Superior Oil Company is a Nevada corporation with its principal place of business in the State of Texas. Superior delivers gas to Panhandle under three contracts, included in its FPC Rate Schedule Nos. 110, 1, and 43.[43]

These named lessee-producer defendants appear individually and as representatives of a class defined by the court as comprising

> ". . . the persons, firms and corporations denominated 'lessee-producers,' who are the owners of leasehold interests in the oil and gas leases [from which gas is produced for delivery to Panhandle Eastern Pipe Line

[38] Gulf Exs. 15-22.

[39] Helmerich & Payne Ex. 10.

[40] Mobil Exs. 15-25.

[41] Pan American Exs. 5-12.

[42] Texaco Exs. 15, 16, 18-32, 34-38.

[43] Superior Exs. 2, 3, and 4.

> Company] and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Panhandle Eastern Pipe Line Company, which helium has been, is being or will be removed and delivered by plaintiff in interpleader National Helium Corporation into the possession of the United States of America at the delivery point described in that certain contract between the United States and National Helium Corporation dated October 13, 1961."[44]

The named defendant individuals, Ralph Grounds, Henry Hitch, and approximately five hundered other individuals appear individually and as representatives of a class defined as comprising

> ". . . the persons, firms and corporations owning a mineral interest in land from which helium has been, or is being, or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being or will be taken into possession by the United States of America in Seward County, Kansas at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader National Helium Corporation dated October 13, 1961."[45]

Phillips was introduced into this case as a third-party defendant by landowners, alleging underpayment of royalties on gas produced in Moore and Hansford Counties, Texas.[46] This claim has been withdrawn. The remaining counts of that third-party complaint were never addressed to Phillips, and it may not be required to respond to those claims for the first time after trial. Phillips' request for findings of fact and conclusions of law demonstrating the lack of independent jurisdictional grounds for the claim is therefore moot.

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[44] Dkt. 1135, KC-1969.

[45] Ibid.

[46] Dkt. 163, KC-1980.

We conclude in KC-1980 that lessee-producers are proper parties both individually and as representatives of a class; that Phillips must be dismissed on the ground that no claim is asserted against it.

W-3009.

The original plaintiffs in this case are Oliver S. Brown, Harry Lightcap, T. A. Dudley, Dan C. Sullivan, Jr., L. F. Roderick, Stanley Julian, the E. W. Campbell Estate, Ruth C. Rice, Executrix, Herbert and Norma Foster, Fred Shore and Hazel Shore, Gerald G. Finley, A. W. Klassen, John Alford, Robert Larrabee, Robert Larrabee as Executor of the Estate of Lee Larrabee, Deceased, Emil Schnellbacker, Wylie R. Gore, George H. Anderson, Ora V. Martin and Lela Z. Martin, and Gene Cyr. The intervening plaintiffs are Alfred Akers (Akin), Chester C. Clark, Dorothy M. Cox, Della M. Drake, John R. Jones, Bertha E. Kells, C. A. Kells, a/k/a Chester A. Kells, W. L. Lacey, L. G. Moore, Warden L. Noe, Bernard J. Nordling, Homer Leroy Parshall, Leone L. Parshall, Lillie Snare (Snarl), June Stegman as Guardian of Patricia A. Stegman, June Stegman as Guardian of Victor J. Stegman, and Edith Thompson. These parties appear individually and as representatives of a class defined by the court as consisting of:

> ". . . the persons, firms and corporations owning mineral interests in land from which helium has been, or is being severed from the ground in connection with or because of production under oil and gas leases, which helium has been, or is being taken into the possession of the defendant United States of America at points in Seward, Ellsworth or Grant Counties, Kansas, or Hansford or Moore Counties, Texas, described in the four following contracts:
>
> (a) Contract between United States of America and Helex Company, now Northern Helex Company, dated August 15, 1961.
>
> (b) Contract between United States of America and Cities Helex dated August 22, 1961.

(c) Contract between United States of America and National Helium dated October 13, 1961.

(d) Contract between United States of America and Phillips dated November 13, 1961."[47]

The United States is the sole defendant in this case. It has joined as third party defendants National Helium, Cities Service Helex, Inc., Northern Helex Company (formerly Helex Company) and Phillips, the parties to the four contracts recited in the foregoing paragraph.

W-3159.

The named original plaintiffs in this action are Ralph Grounds and Henry Hitch, Jr. Intervening plaintiffs are Robert Adams, C. Dale Duer, Hubert R. Elrod, Ruth F. Fischer, Zuba D. Jefferis, Alonzo C. Robinson, the John A. Spohn Estate, W. D. Ross and Herb Williams. These parties appear individually and as representatives of the class of plaintiff as defined in the preceding case, W-3009. Again, the United States is the sole defendant, and it has impleaded as third-party defendants the same four corporations impleaded in the preceding case, W-3009.

Class Actions

The Court has, in the light of the evidence and recent decisions, reconsidered its rulings designating certain named representatives of described classes for the prosecution and defense of certain claims in each of the consolidated cases.

The basic prerequisities for maintenance of a class action are stated in Rule 23(a), F.R. Civ.P.:

> "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the

[47] Dkt. 1135, KC-1969.

> class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

In addition, the action must satisfy one or more of four prerequisites stated in Rule 23(b).

By order filed January 16, 1967,[48] the Court defined the classes of landowners and lessee-producers in each interpleader case as set out supra under the heading, "Parties." In addition, we defined the class of plaintiff landowners in W-3009 and W-3159. As to each class, we found that the class was so numerous that joinder of all members was impracticable, that there were questions of law or fact common to each class, that the claims and defenses of the representative parties in each class were typical of the claims and defenses of the class, that the representative parties would fairly and adequately protect the interests of the class.

We found further as to each class that the further prerequisites of Rule 23(b) (1) (A) and (B) were met, in that prosecution of separate actions by or against individual members of the class would create a risk of:

> "(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing, the class, [and]
> "(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; . . ."

A separate finding was made as to the class of lessee-producers in KC-1980, on the ground that claims by and against members of that class met the prerequisite of Rule

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[48] Dkt. 1135, KC-1969.

23(b) (3), in that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[49] We adopt these findings herein.

In our view, these actions are eminently suited to class proceedings. There are estimated to be approximately 30,000 persons who receive income from the production of helium-bearing natural gas from which helium is extracted, by virtue of ownership of land, mineral interest, and/or royalty or other interests. These cases have required lengthy, extensive and costly discovery proceedings, the expenditure of many hours in legal research, assembly and preparation of exhibits, numerous pretrial appearances, in addition to the conduct of a forty-three day trial. [Counsel for landowners state that their expenditures to date exceed $90,000.] To require thousands of individual landowners to present their claims to the fund individually would encumber these interpleader actions with procedural and other complexities of perhaps unmanageable proportions. Likewise, in cases W-3009 and W-3159, the class proceeding permits the economical and expeditious resolution of many claims in one proceeding. As stated in *Eisen v. Carlisle & Jacquelin,* 391 F. 2d 255 (2nd Cir. 1968):

> "Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." 391 F. 2d at 560.

Likewise, the lessee-producers are very numerous. Each interpleading pipeline it is estimated has several hundred gas purchase contracts in the area. Joinder of vendors

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[49] Dkt. 66, KC-1980.

under all these contracts would be impracticable and unnecessary.

Cities takes the position that the landowner representatives cannot adequately represent the entire class of landowners, because of alleged conflicting and antagonistic interests between two subgroups of the class, those whose recovery depends entirely upon a determination that helium is "gas" within the terms of mineral conveyances, oil and gas leases, unitization agreements and like documents, and those whose recovery would be enhanced by a determination that helium is *not* "gas" within the terms of such documents.

Certain lessee-producers argue that the landowner class cannot sue or be sued as a class unless they are divided into seven sub-classes as authorized by Rule 23(c) (4).[50]

Of the recited sub-classes, five claim in common that leases do *not* cover helium. Within those five sub-classes, there is no antagonism or conflict of interest between those who may claim all or only a proportionate share of helium or the proceeds from its sale. Lessee-producers envision two sub-classes as claiming that leases *do* cover helium, and claiming in addition that lessee-producer gas purchase contracts provide no payment for helium contained in natural gas delivered thereunder. We would point out that these two sub-classes would also recover if leases were found *not* to cover helium. We fail to perceive any antagonism or conflict of interest among the sub-classes with respect to the issues here involved.

Landowners in pleading and presenting their case have sought recovery on alternative propositions: One, that the leases *do not* covey helium; the other, that they do; but the landowners have not been paid therefor. The Court remains convinced that there is no occasion to create seven sub-classes among landowners to present separately, two

[50] See, e.g., Dkt. 1047, KC-1969.

alternative and mutually exclusive theories, which have both been most ably investigated, pleaded and tried by counsel in behalf of the land owner class.

In Cases W-3009 and W-3159, the United States denies that "all owners of lands or mineral interests from which helium-bearing natural gas is produced which is the subject matter of this action comprise a class which can be represented by the named plaintiffs (Landowners) in this action."[51] The United States does not specify in what particular respects the representative parties, or their counsel, fail to represent adequately the absent members of the class, or in what respect their claims and defenses are not typical of those absent persons. For the reasons stated supra in this section, we remain of the view that the claims of representative landowners are typical of those of absent members, that they raise questions of fact and law common to the class, and that the representative parties have fully represented and protected the interests of the entire class.

Lessee-producers have renewed objections to orders of the court, all entered prior to July 1, 1966, finding that landowners constituted a "true" class in each of the interpleader cases.[52] Rule 23 as amended became effective July 1, 1966, and was applied to all pending cases in subsequent class rulings. However, the order of January 16, 1967, in which the classes were defined, provided that "classes previously defined by the court in regard to claims of . . . Northern Natural Gas Company and Northern Helex Company in KC-1969 and claims of third-party plaintiff Panhandle Eastern Pipe Line Company in KC-1980 are not affected by this order." The class of landowner defendants in KC-1980 was previously denominated a "true" class.[53] This categorization was important under the

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[51] Pre-Trial Order, W-3009, W-3159, p. 13, ¶ 2 of each case.

[52] Dkt. Nos. 535-538, 649, KC-1969.

[53] Dkt. 649, KC-1969.

old rule principally for identifying persons bound by the judgment, and helping in turn to determine the res judicata effect of the judgment if questioned in a later action. See Notes of Advisory Committee on Rule 23. We determine that the extent of the judgment in this case is to be governed under Rule 23 as amended. These objections are thus mooted.

Lessee-producers object to the court's order that Panhandle's third-party complaint in KC-1980 be maintained against them both individually and as representatives of a class of approximately 540 producers who sell natural gas to Panhandle which is processed for helium extraction. Maintenance of this complaint against the third-party defendants as a class was ordered under Rule 23(b) (3), for which the court made the requisite finding that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[54] Accordingly, the court directed notice be given to absent members of the class.

Rule 23(b) (3) recites four "non-exhaustive factors" to be considered in authorizing a class proceeding under that subsection:

> "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

At no time prior to trial did it appear that any individual member of the class had any interest in exercising separ-

[54] Dkt. 66, KC-1980; See Motion, Dkt. 58, KC-1980.

ate control over the prosecution or defense of any claim, that any prior litigation existed between Panhandle and any member of the lessee-producer class respecting the issues raised in the third-party complaint, that it was not desirable and in the interest of expedition and economy of litigation to concentrate litigation of Panhandle's claims against all its gas vendors in one particular forum, or that a class proceeding would occasion any special difficulties. Moreover, it was clear that questions of law and fact common to members of that class predominated over questions affecting only individual members, and that permitting maintenance of the claims of Panhandle's gas vendors to the fund in the interpleader action was superior to any other available method for the fair and efficient adjudication of the lessee-producers' claims to that fund in KC-1980. After trial, with the benefit of hindsight, the court remains convinced of the correctness of the order regarding the class of lessee-producers in KC-1980, and we decline to disturb it.

We find that the representation of the interests of both classes is fully adequate, on at least two grounds. First the representation by counsel for both the landowner and lessee-producer classes has been of the highest quality. Their presentation reflected diligent, careful, and incisive attention to the interests of the class. In addition to the most careful investigation by deposition, interrogatories and other discovery of facts, they have explored fully, in evidence, briefs and arguments, what must surely be every conceivable theory which the facts could possibly support.

Secondly, the very number of representative parties is substantial. There are over 200 named landowner claimants in KC-1945; seven in KC-1946; six in KC-1947; 45 in KC-1948; over 500 in KC-1969, and over 300 in KC-1980, in addition to those named in W-3009 and W-3159, some of whom appear in the interpleader cases, also. Thus, in toto, over one thousand landowners advanced claims in

their own behalf and that of others similarly situated in all these consolidated cases.

Lastly, we turn to the question of notice to the members of the landowners and lessee-producer classes to whom the court has not yet directed notice to be given, which includes all except the lessee-producer class in KC-1980. In our order filed January 16, 1967,[55] the court found that the claims of all the classes met the requirements of Rule 23(b) (1)(A) and (B), and that accordingly notice to absent members of those classes was not required at that stage of the case, prior to trial on the issues of liability alone. This holding was based on the view that notice to absent members was required only when the class proceeding was founded upon Rule 23(b)(3).

Subsection (c)(2) provides as follows:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Absent requirement of notice in class proceedings under Rule 23(b) (1) and (2), we regarded notice as mandatory only for class proceedings under 23(b) (3). The Court of Appeals for the Second Circuit in May, 1968, addressed itself to this point, thus:

> "We must also note that plaintiff's effort to qualify the action under 23(b) (1) and 23(b) (2) was induced by his erroneous theory that notice is not 'mandatory'

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[55] Dkt. 1135, KC-1969.

> under these sections. This theory is based on the assumption that 23(c) (2) provides the only 'mandatory' notice required by the new rule. Since this particular section refers exclusively to actions brought under 23(b) (3), other suits cognizable under either 23(b) (1) or 23(b) (2) would only be subject to 'discretionary' notice under 23(d) (2). Nevertheless, we hold that notice is required as a matter of due process in all representative actions, and 23(c) (2) merely requires a particularized form of notice in 23(b) (3) actions. . . ." *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 at 564-565 (2nd Cir. 1968) [Footnotes and citations omitted.]

We think that the essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by named parties. As stated in *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968).

> "The Supreme Court has indicated that adequacy of representation, not form of notice, is the crucial consideration. See *Hansberry v. Lee*, 311 U.S. 32, 42, 61 S. Ct. 115, 118, 85 L.Ed.22 (1940) ('this Court is justified in saying that there has been a failure of due process *only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.*'" [*Emphasis by the court.*] 43 F.R.D. at 500.

We cannot, of course, determine the res judicata effect of the judgment entered herein, but we deem in the public interest that the extent of the judgment be as broad as constitutionally permissible. We think this interest will be best served by directing that "the best notice practicable under the circumstances" be given all members of the class of landowners and lessee-producers, prior to entry of judgment, apprising them of the extent of the proposed judgment and providing any member thereof adequate time to signify his dissatisfaction with the adequacy of representation of his interest, and to advance any new

claim to the interpleader fund, or against the United States which arises out of his status as a member of the described class and which has not been adjudicated herein.

The present view of the Court, is that the best notice practicable includes individual notice to all members of each class, and that this can be accomplished with "reasonable effort."

Jurisdiction

The basic jurisdiction of the Court is premised upon 28 U.S.C. Section 1335; 1397 and 2361.

Jurisdiction of the six interpleader cases is founded upon 28 U.S.C. Section 1335, which provides as follows:

> "(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation . . . having in . . . its custody or possession money or property of the value of $500 or more, . . . or being under any obligation written or unwritten to the amount of $500 or more, if
>
> (1) Two or more adverse claimants, of diverse citizenship as defined in Section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.
>
> (b) Such an action may be entertained although the titles or claims of the conflicting claimants do not

have a common origin, or are not identical, but are adverse to and independent of one another."

In *State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523, 18 L.Ed. 2d 270, 87 S.Ct. 1199 (1967), the Court established the principle that in interpleader actions under § 1335, only "minimal diversity" is required, that is, diversity of citizenship between any two adverse claimants. Such diversity exists in these cases.

By the terms of the above statute, jurisdiction is dependent upon deposit of the money or property in court by the interpleading party, or else the giving of bond "with such surety as the court or judge may deem proper." *Farmers Elevator Mutual Insurance Company v. Jewett,* 394 F.2d 896 (10th Cir. 1968).

In KC-1945, Cities Service Gas has given bond in the sum of $16,000, with proper surety,[56] and Cities Service Helex gave like bond upon entry into the case.[57] Cities Service Helium (now Cryogenics), joined as an involuntary plaintiff, filed no bond, so far as appears. In KC-1946, -1947, 1948, Cities Service Gas and Cities Service Helex each filed the following respective bonds: $15,000;[58] $12,000;[59] $32,000.[60] In KC-1969, Northern Natural Gas and Northern Helex jointly filed a bond, with surety, of $100,000.[61] In KC-1980, National Helium filed bond with surety of $100,000. Ashland Oil & Refining Company moved December 15, 1966, to enlarge the bonds in cases KC-1947, -1969, and -1980, to not less than $75,000,000, $75,000,000, and $110,000,000, respectively,[62] these sums based on mo-

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[56] Dkt. 5, KC-1945.

[57] Dkt. 48, KC-1945.

[58] Dkts. 5, 37, KC-1946.

[59] Dkts. 5, 39, KC-1947.

[60] Dkts. 5, 58, KC-1948.

[61] Dkt. 5, KC-1969.

[62] Dkt. 1095, KC-1969.

vant's estimates that during a period of six years projected to elapse from the commencement of helium extraction operations and sales by the interpleading plaintiffs in those cases until judgment herein, proceeds by the plaintiffs would total approximately $64,000,000, $67,000,000, and $107,000,000, respectively. After argument, the motion was withdrawn.[63] Shortly thereafter, counsel for Cities Service Gas Company filed an order reciting a statement and agreement made in open court that "Cities Service Gas Company would be responsible for and would pay and satisfy any final money judgment against Cities Service Helex, Inc., or Cities Service Cryogenics, Inc., in this action which is not otherwise paid or satisfied," the captioned case being KC-1946 only.[64]

The Interpleaded Funds.

It has been generally agreed since the commencement of these cases that the funds involved consisted of the proceeds from the sale of helium. The interpleading plaintiffs have been and presently are making sales of helium only to the United States.

The Court finds that in cases KC-1945 through KC-1948, the fund consists of all proceeds received and to be received by Cities Service Helex, Inc., from the United States as payment for helium contained in a helium-gas mixture delivered to the United States pursuant to that contract between the United States and Cities Service Helex, Inc., executed August 22, 1961. Stated otherwise, the subject matter of these four cases consists of the obligation of Cities Service Helex, Inc., to pay the proceeds received by it from the sale of helium to the United States or to any other purchaser, to any person found to be the owner of such helium, or to be otherwise entitled to participate in such proceeds.

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[63] Dkt. 1137, KC-1969.

[64] Dkt. 1139, KC-1969.

The Court further finds that the fund interpleaded in KC-1969 consists of all proceeds received or to be received by Northern Helex, Inc. (formerly Helex, Inc.) as payment for helium contained in a helium-gas mixture delivered to the United States under that contract between the United States and Helex, Inc., dated August 15, 1961. Stated otherwise, the subject matter of the action consists of the obligation of Northern Helex, Inc., to pay the proceeds received by it for the sale of helium to the United States, or to any other purchaser, to any person found to be the owner of such helium, or to be otherwise entitled to participate in such proceeds.

The Court further finds that the fund interpleaded in KC-1980 consists of all proceeds received and to be received by National Helium Corporation from the United States as payment for helium contained in a helium-gas mixture delivered to the United States under a contract executed October 18, 1961. Again, stated more broadly, the subject matter of the action consists of the obligation of National Helium to pay the proceeds received by it as payment for helium sold to the United States or to any other purchaser, to any person found to be the owner of such helium, or to be otherwise entitled to share in the proceeds of its sale.

The foregoing funds were not those initially interpleaded by plaintiffs in the Cities cases and in KC-1980. The landowners moved to dismiss all six interpleader actions for want of jurisdiction, arguing, inter alia, that the funds before the Court did not include the amounts received by the interpleading plaintiffs from the sale of helium to the United States. The Court overruled this motion, stating that the "subject matter in controversy as contemplated by the interpleader statute is the claim of ownership under the mineral leases of the helium produced and marketed." This ruling was affirmed in *Grounds v. Northern Natural Gas Co.*, 327 F.2d 1003 (10th Cir. 1964) (per curiam).

Subsequent to this ruling, the subject fund was more precisely defined and enlarged. By order filed January 10, 1967, the fund in the Cities cases (KC-1945, -1948) was defined thus:

> "Counsel for plaintiffs [the Cities group] states that the interpleaded fund involved in such four law suits, is the proceeds from the sale of all . . . the helium which has been or is being extracted by Cities Service Helex, Inc."[65]

In KC-1980, plaintiff National Helium interpleaded at the outset only its obligation to pay to Panhandle $2.06 per Mcf for helium extracted from the gas stream belonging to Panhandle. It did not interplead the monies received for its sale to the United States. In the commencement of that action, however, National Helium sought and obtained an injunction against further prosecution of a declaratory judgment action in an Oklahoma state court, in which plaintiffs sought a determination that they were the owners of and entitled to the net value of all helium sold by National Helium to the United States, thus putting in issue in that state court case the right to entire payments for helium received by National Helium for helium sales to the United States. The discrepancy between the scope of the two cases was raised at a hearing April 20, 1964, after the Tenth Circuit ruling supra. Counsel for National Helium then stated that "if the pleading (in KC-1980) is not as broad as the pleading in the State Court so that the issues are not the same, that we will make them the same." Counsel stated further at that hearing:

> "Your Honor, what I have been trying to say was that in the National Helium case, at least, we look upon the liability of National Helium as the value of the helium, whatever it may be, more or less. I mean it might be more than eleven dollars. It might be less.

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[65] Dkt. 1114, KC-1969.

> We accept the liability of National Helium for the value of the helium and that ought to clear the air as far as National Helium goes."[66]

Although examination of the files discloses no amendment of the pleadings, we cannot but conclude from the foregoing that the interpleaded fund in KC-1980 is as we have determined it to be.

Jurisdiction of Landowners' Cross-Claims.

The landowners' claim to the fund rests on one of two theories; first, that oil and gas leases in which they hold interests and under which natural gas is produced do not convey helium as a constituent of the "gas" leased thereunder, and secondly, that the helex companies are unjustly enriched by monies received by them from the sale of helium.

In addition to their claims against the fund, however, landowners have asserted cross-claims against the lessee-producers, the assertion of which is contingent upon a finding that landowners have no interest in the interpleaded funds themselves. Landowners urge that if the leases do cover helium, first that they have not been paid the proper royalties therefor under the fractional royalty provisions of the leases, and are entitled to recover royalties based upon the fair and reasonable value of helium as attained by reason of its severence from the stream and subsequent marketing; alternatively, landowners urge that the lessee-producers have failed to market helium produced under such leases with reasonable diligence, and seek cancellation of the leases as to the helium portion of the gas stream.

Rule 13(g) F.R. Civ.P. provides thus:

> "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the

[66] Tr. 10:780-781.

> transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

Lessee-producers urge that these cross-claims do not relate to the "property that is the subject matter of the action," the proceeds received by the plaintiffs from the sale of helium, that these claims are not ancillary to the interpleader subject matter, that in fact, they are alternative claims not against the fund nor the holders thereof, but against co-claimants founded upon independent contracts, the leases, recovery upon which claims would leave the interpleaded funds intact, and would further require, the granting of in personam judgments against the lessee-producers, which is beyond the jurisdiction of the court in statutory interpleader actions.

In *Knoll v. Socony Mobil Oil Company,* 369 F.2nd 425 (10th Cir. 1966), *cert. denied,* 386 U.S. 977, 18 L.Ed.2d 138, 87 S.Ct. 1173 (1967), the Court stated thus:

> "A related jurisdictional issue is whether the trial court erred in enjoining appellants from asserting any title in or to the 'above described property' in any manner inconsistent with the terms of its order and judgment. This was an *in personam* exercise of jurisdiction. In an interpleader action, however, *in personam* jurisdiction extends only to the fund deposited with the court. Since the trial court was limited to disposition of the *res,* we must hold that the court lacked jurisdiction to enter this order." 369 F.2d at 429.

The fund before the Court in that case was the money held by Mobil and owing to the true owners of certain property and lease-hold rights therein, from which it had

produced oil. The injunction extended beyond the *res*, precluding claimants from asserting any title in the realty itself.

In *Erie Bank v. United States District Court for the District of Colorado*, 362 F.2d 539 (10th Cir. 1966), the Court held that in an interpleader action in which the plaintiff asserted no claim to the deposited fund, it lacked jurisdiction over a counterclaim by a claimant against the disinterested stakeholder on the ground that the latter was not an "opposing party" within Rule 13. It would appear to follow that when the stakeholder was himself an interested party, a counterclaim would be not only permissible under Rule 13, but compulsory thereunder, and the Court would be empowered to enter judgment on such counterclaim.

As to landowners' cross-claims, however, for additional royalties on helium or on the value of natural gas as allegedly enhanced by the presence of helium, and for cancellation of leases as to helium for failure to market same, we must agree with the lessee-producers that those claims do not relate to the subject matter of the action. It is true that landowners' claims are founded upon the identical leases upon which lessee-producers base, in important part, their claims to the fund. In interpleader actions, however, the "subject matter of the action" is not a set of facts, a transaction or other occurrence which gives rise to litigation, but a specific identified fund or property. Claims must not only "relate" to that property, but be asserted against it, as we view the present law of this Circuit.

This is a type of case of which the Supreme Court spoke in *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 18 L.ed.2nd 270, 87 S.Ct. 1199 (1967), "where a stakeholder, faced with rival claims to the fund itself, acknowledges—or denies—his liability to one or the other of the

claimants. In this situation, the fund itself is the target of the claimants. *It marks the outer limits of the controvery.*" 386 U.S. at 534, 18 L.Ed.2d at 277. [Emphasis supplied.] [Footnote omitted.] We therefore lack jurisdiction over the landowners' cross-claims against their lessee-producers.

Jurisdiction of Pipeline Counterclaims.

The lessee-producers claim the fund on the ground that helium, a non-combustible and non-hydrocarbon component of the gas stream, did not pass to the pipeline companies under the gas purchase contracts between the parties. Accordingly, the pipeline companies, Cities Service Gas, Northern Natural and Panhandle have asserted counterclaims against the lessee-producers on their warranties of title in contracts with pipeline companies contingent upon the recovery by the producers of the funds.

These claims are twofold: First, it is asserted that warranties of title in the parties' gas purchase contracts extend to the full gas stream, and that if only the hydrocarbon portion passed thereunder, the lessee-producers must respond to the purchasers for breach of warranty respecting the balance of the stream. Alternatively, pipeline companies seek recovery from each of the lessee-producers of that percentage of all payments made under the gas purchase contracts which the volume of non-combustible constituents including helium bears to the volume of the total stream.

These counterclaims are founded upon the identical gas purchase contracts under which the lessee-producers claim the fund. They arise out of the "transaction . . . that is the subject matter of the opposing party's claim," or they relate to property that is the subject matter of the original action. We conclude that these counterclaims are permissible under Rule 13, insofar as they affect the rights of the parties to participate in the fund.

Jurisdiction of Claims Asserted Against the United States.

An additional jurisdictional problem is raised in the actions by landowners against the United States. The United States denies first that the landowners constitute a class, a question we have heretofore disposed of,[67] and contends further that the United States is not subject to suit by a class. In each of these cases, the landowners assert two separate claims against the government. First, they assert ownership of the helium being delivered to the United States by each of the helium extracting companies, and urge that the United States has appropriated and converted helium so delivered to its own use, and must respond to plaintiffs for the fair, just and reasonable value of same. Jurisdiction for this claim under the Tort Claims Act is asserted under 28 U.S.C. § 1346(b), which confers upon the district courts exclusive jurisdiction of:

> "civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal inqury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Plaintiffs' second claim commingles theories of third-party beneficiary rights and reverse condemnation. It is alleged that the United States has acquired possession of the helium-gas mixture received from its vendors by the exercise of its power of eminent domain, and further that the contracts under which the United States purchases helium provide for payment therefor to the owners thereof, and that as such owners, the plaintiffs are third-party beneficiaries thereof. Jurisdiction for this second claim

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[67] Page 21, supra, (Class Actions).

under the Tucker Act is asserted under 28 U.S.C. § 1346(a)(2), which confers upon the district courts, concurrent with the Court of Claims, jurisdiction over the following cases:

> "(2) Any other civil action [other than enumerated tax-related actions] or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Although landowners alleged that no individual claim may exceed $10,000, they have stipulated that claims of some individuals exceed that sum.[88]

The defendant United States asserts that the United States is not liable to suit by a class without its consent, that since neither § 1346(b) or § 1346(a)(2) makes express provision for suit by a class, no such consent has been given. The government invokes the principle that statutory waivers of sovereign immunity are strictly construed, that waivers are not lightly implied, and that no justification exists for implying such a waiver in favor of a class of plaintiffs, most of whom are not identified.

It is further argued that under the Tucker Act,[88a] and its predecessor statutes dating back to 1855, no court has granted relief in a class action against the government, and that neither the Tucker Act nor the Tort Claims Act adopted in 1946 has been amended by Congress to provide for such proceedings. Defendant further complains of the burden falling upon the government by the difficulties of payment of judgments in favor of a large class of plaintiffs, many of whom are not now identified. Payment of

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[88] Dkt. 527, KC-1969; See Government's Brief, Dkt. 892, KC-1969; Dkt. No. 59, W-3009.

[88a] Act of March 3, 1887, c. 359, 24 Stat. 505.

persons holding judgments against the United States rendered in the district courts is authorized in 28 U.S.C. § 2414, payments to be made on settlements by the General Accounting Office upon certification by the Attorney General that the judgment is final, that is, that no appeal will be taken therefrom or that no further review will be sought of a decision affirming the same. This burden does not seem substantial. Rule 23 requires that "[t]he judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), [the instant case] whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class."

Notwithstanding that Rule 1, F.R.Civ.P., provides that "[t]hese rules govern the procedure in the United States district courts in *all* suits of a civil nature . . . with the exceptions stated in Rule 81," (none of which apply) [Emphasis supplied.] it is argued that absent an express consent to suit by a class, no jurisdiction exists, and that under Rule 82, the rules "shall not be construed to extend . . . the jurisdiction of the United States district courts." In *United States v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941), the Court stated:

> "The jurisdiction thus limited [by the Tucker Act] is unaffected by the Rules of Civil Procedure which prescribe the methods by which the jurisdiction of the federal courts is to be exercised, but do not enlarge the jurisdiction." 312 U.S. at 591, 85 L.Ed. at 1064.

The Court stated further that the Tucker Act "must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted." 312 U.S. at 590, 85 L.Ed. at 1063.

The Court again addressed itself to the canon of strict construction in *United States v. Yellow Cab Co.*, 340 U.S. 543, 95 L.Ed. 523, 71 S.Ct. 399 (1951), where it stated, quoting *United States v. Aetna Cas. & Surety Co.*, 338 U.S.

366, 383, 94 L.Ed. 171, 186, 70 S.Ct. 207, 12 A.L.R. 2d 444 (1949):

> "'In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson v. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 NE 28, 29-30: "The exemption of the sovereign from suit involved hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."'" 340 U.S. at 554, 95 L.Ed. at 532.

In *Capital Transit Co. v. United States,* companion case to and decided with *Yellow Cab, supra,* the defendant sought to implead the United States as a third-party defendant, as a joint tortfeasor obligated to contribute to any judgment ultimately won by the plaintiff. The lower court dismissed the third-party complaint, holding it barred on the ground that no consent to such suit had been given. The Court reversed, holding that, having decided in the companion case that the government could be sued for contribution in an independent action, such right could be enforced by way of third-party complaint, and that the third-party practice provided for by Rule 14 was applicable to suits against the United States. In *United States v. Muniz,* 374 U.S. 150, 166, 10 L.Ed.2d 805, 817, 83 S.Ct. 1850 (1963), the Court reaffirmed its holding in *Rayonier, Inc. v. United States* 352 U.S. 315, 1 L.Ed. 2d 354, 77 S.Ct. 374, that "'[t]here is no justification . . . to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it'". The rule of strict construction is not one of narrow construction. The prevailing trend of decision is canvassed in *City of Pittsburgh v. United States,* 359 F.2d 564 (3d Cir. 1966):

> "Although at one time the doctrine of sovereign immunity had such vitality that a waiver of it was

> strictly construed (See *United States v. Sherwood*, 312 U.S. 584, 590, 61 S.Ct. 767, 85 L.Ed. 1058 (1941)), the purpose of the Federal Tort Claims Act to permit those injured by the negligence of employees of the United States to recover damages to the same extent as if the United States were a private person expresses so strong a public policy that the statute has been deemed to be highly remedial and has received a liberal construction. [Citations omitted.] This overriding purpose, expressed in the statute, has provided the guide to the interpretation of the Act, and it has been applied in some circumstances where its literal language might have resulted in a restricted meaning . . . [T]he view has ultimately prevailed that the United States may be sued by a subrogee of the injured party, by an indemnitee who has paid the injured party's claim, and that it may be joined originally with other defendants as a joint tort-feasor, and may also be impleaded as a third-party defendant to enforce contribution against it as a joint tort-feasor." 359 F.2d at 567. [Footnotes omitted.]

Strictly speaking, the permissibility of a class action under the Tort Claims Act does not require construction of the language of the Act, for it is silent on the question. In substance, the government asks the Court not to construe the Act strictly or narrowly, but to create a judicial exemption from it. Neither the plaintiff nor defendant have pointed to any real increased procedural burden upon the government resulting from the defense of a class action.

Given the remedial purpose of the Tort Claims Act, and indeed of the Tucker Act, the application of Rule 23 to actions thereunder against the United States seems particularly appropriate. As stated in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2nd Cir. 1968):

> "Class actions serve as important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small

> claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." 391 F.2d at 560.

Quoting academic commentary on the device, the court in *Dolgow v. Anderson*, 43 F.R.D. 472 at 484 (E.D.N.Y. 1968) noted that the class action is "particularly appropriate where those who have allegedly been injured 'are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive.'" The instant cases are excellent examples, where only an exceptionally circumstanced landowner could afford the lengthy, extensive and costly preparation and litigation involved.

Given the silence of either the Tucker Act or the Tort Claims Act on the propriety of class proceedings, the absence of any apparent substantial burdens sustained by the government in defending such actions, the economy of litigation achieved thereby, and the enhanced access of small claimants to legal redress against the government, we hold that jurisdiction does not fail under 28 U.S.C. § 1346(a) (2) and (b) because plaintiffs have sued as a class.

One question remains concerning jurisdiction under the Tucker Act, which confers jurisdiction over a "civil action or claim against the United States, not exceeding $10,000 in amount, . . ." If the stated jurisdictional limit for actions against the United States in the district courts under the Tucker Act applies to the entire sum sought to be recovered from the government in the action, then jurisdiction for plaintiffs' claim under the Tucker Act lies only in the Court of Claims. If the jurisdictional monetary limit applies only to the claim of each individual plaintiff, we have jursdiction of all claims not exceeding $10,000. No authority is cited on this issue, and independent research discloses none. We hold for the reasons set forth above

that the jurisdictional monetary limit applies to the claim of each member of the class and we therefore have jurisdiction over the claims not exceeding $10,000 asserted under the Tucker Act.

As indicated, supra, plaintiffs have commingled two theories in their claim under the Tucker Act, claiming standing thereunder first as third-party beneficiaries of the contracts of the United States with each of the helium extraction companies, and secondly, as owners of property acquired by the government by exercise of its powers of eminent domain without paying just compensation therefor.

Each of the contracts upon which plaintiffs rely provides that if the vendor of helium is required to make payments to other persons for helium extracted by them and sold to the United States, or for the acquisition of helium in natural gas, the United States will reimburse each for such amounts, with the companies themselves bearing approximately the first $3.00 per Mcf of the costs of such reimbursement. The obligation of the United States runs only to its contractors, and payments are required to be made only to such companies in the amount those companies themselves have paid, less approximately $3.00 per Mcf. Payments by the United States to any one of its contractors under these reimbursement provisions is triggered, as it were by first, a determination of the company's liability to persons found to be entitled to such compensation for the helium, and secondly, by actual payment therefor. The need for adjudication of liability may be waived by the United States, by consenting to such payments. Once these conditions are met, the obligation of the United States runs only to its contractors. The entire scheme of the contracts precludes the direct action against the United States.

A mere promise to indemnify against damages does not constitute a contract for the benefit of third persons which

a party claiming damages may enforce directly against the indemnitor, "Here the promisor's liability does not arise until the promisee has suffered loss or expense. Until then the promisee has no right of action, and consequently one claiming damages can assert no derivative right against the promisor, much less a direct right." 2 Williston on Contracts § 403 (3rd ed.) "An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee." Restatement of Contracts, § 147.

We conclude that plaintiff landowners are but incidental third-party beneficiaries, and as such lack standing to maintain their Tucker Act claim on this ground.

The balance of their claim thereunder must be founded "upon the Constitution, or any Act of Congress, or any regulation of an executive department . . ." Plaintiffs allege that the government's acquisition of helium constitutes an exercise of its powers of eminent domain. "When the United States takes property for public use and without just compensation as required by the Fifth Amendment, the owner may sue under the Tucker Act." *United States v. Wald,* 330 F.2d 871 at 872 (10th Cir. 1964). An actual taking must be established. Once found, the suit becomes in effect a condemnation action in reverse. Landowners must establish such a taking, as a jurisdictional prerequisite to maintenance of their Tucker Act claim, or the same must be dismissed for want of jurisdiction.

The Geographical Area

The helium giving rise to the funds in these interpleader cases and the suits against the United Sattes is contained in natural gas produced from an area denominated the Hugoton Gas Area, which lies in parts of three states, Texas, Kansas, and Oklahoma.[69] The area covers approx-

[69] There is some contention that parts of Colorado comprise the Hugoton Area or Field. If so, we have no indication of Colorado gas wells being involved in these proceedings.

imately 210 miles from north to south, 160 miles from east to west, and covers approximately 33,000 square miles and over 21 million acres. The area comprises six principal gas fields. The Kansas Hugoton Field lies in eleven Kansas counties in the southwestern part of the state: Hamilton, Kearny, Finney, Gray, Haskell, Grant, Stanton, Morton, Stevens, Seward and Meade. The Guymon Hugoton Field lies in Texas, Beaver, and Cimarron counties in Oklahoma. The Texas Hugoton and East and West Panhandle Fields lie almost wholly in the northernmost three tiers of counties, twelve in all, of the Texas Panhandle.[70]

Fields within this geographical area from which natural gas is produced but not processed for helium extraction by interpleading plaintiffs, include, among others, the Cliffside Field in Texas, the Keyes Field in Oklahoma, and the Greenwood Field in Kansas.

The gas underlying the geographical area outlined above contains approximately fifteen per cent of the known natural gas reserves of the United States. It is, according to some testimony, the largest single pressure-connected gas reservoir in the world. It serves approximately fifteen million domestic and industrial consumers. Most important for this litigation, these fields were estimated, as of the mid-1950's, to contain ninety-nine per cent of the economically recoverable helium in the United States, totalling approximately 119 billion cubic feet of helium from estimated resources of a total of 36.4 trillion cubic feet of gas.[71]

Commercial gas production of natural gas from the Hugoton fields began a half century ago with the completion of the first well, located in the Texas Panhandle, in

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[70] LOX 791; Helex Ex. 36 (See Maps).

[71] LPX 53, p. 1; LPX 56, p. 10.

1918.[72] The first gas well in Kansas Hugoton was completed in 1922, near Liberal, and the discovery well of the Guymon Hugoton (Oklahoma) was completed in 1922. The generally-regarded discovery well of the Kansas Hugoton was completed in 1927.[73] Development of the fields in terms of wells completed was relatively slow until the late 1920's and early 1930's, when pipelines were first extended into the area, thus making accessible widespread industrial and consumer markets.[74] Development accelerated after World War II, with the further expansion of pipelines through the area, to transport gas to more widespread fuel markets. The geographical productive limits of the fields expanded gradually until in 1941, the Kansas Corporation Commission first defined the limits of the Kansas Hugoton Field.[75] The Guymon Hugoton Field was first defined by the Oklahoma Corporation Commission in 1945.[76] The Texas Panhandle Fields, East and West, developed earlier, and not until 1945 did the number of wells in the Hugoton Fields of Texas, Oklahoma and Kansas equal those in the Panhandle Field.[77] From the completion of the first well in 1918 through 1965, more than 15,000 gas wells were drilled in this area.

The development of these fields is reflected in the incidence of leasing activity, which show that over 85 per cent of the leases outstanding in Kansas were taken since 1940; that over 75 per cent of the Oklahoma leases were taken after 1940; and that in Texas, where drilling and leasing activity commenced earlier, 65 per cent of the outstanding leases canvassed were taken in 1941 and there-

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[72] Gensch Tr. 2:128.

[73] Gensch Tr. 2:130.

[74] Helex Ex. 37.

[75] LOX 791; Gensch Tr. 2:151-152.

[76] Gensch Tr. 2:151-153.

[77] Tr. 46:4484.

after.[78] Wells were drilling in the Hugoton gas area as follows:

CUMULATIVE TOTAL WELLS

	Panhandle Field	*Hugoton*		
		Kan.	*Okla.*	*Texas*
1924	29	1	—	—
1929	444	8	3	4
1934	856	142	8	4
1939	1435	282	28	6
1944	1763	403	172	16
1949	2338	1848	760	367
1954	3010	3317	1339	838
1959	3841	3891	1378	932[79]

HELIUM AND NATURAL GAS

The presence of helium in natural gas was first discovered in 1905, by two University of Kansas professors, Cady and McFarland, who analyzed a sample from a gas well at Dexter, Kansas, drilled and completed in 1903, and discovered it to contain 1.84 per cent helium, with minute quantities of two other inert gases, neon and argon. This gas had a relatively low British thermal unit (Btu)[80] content, under 500 Btu, and was a relatively inefficient fuel gas.

Helium is contained, in either measurable or detectable quantities, in gas found in the majority of natural gas fields in the United States. In 1918, the Bureau of Mines commenced a program of gas analyses of samples collected from fields over the nation. The first report of analyses collected thereunder was published in 1921; that report discloses the presence of helium in either trace or measur-

[78] LOX 794; Tr. 6:428 et seq.

[79] Helex Ex. 57.

[80] The amount of heat required to raise the temperature of one pound of water one degree Fahrenheit at 39.2°F.

able quantities, in virtually all of 183 samples collected from Texas, Oklahoma, and Kansas.[81] Since that time, approximately 5800 gas samples have been analyzed and reported in Bureau of Mines information bulletins and circulars, representing 3,008 gas fields in 33 states in this country from which commercial gas production has been obtained. Over 95 per cent of these samples contained helium in trace or measurable quantities.[82] Of an additional 947 samples subsequently reported, only two contained no helium.[83] Thus, the presence of helium has been detected or measured in natural underground gas reservoirs throughout the greater part of the United States.[84]

The presence of helium in natural gas has not been a secret to which the Bureau of Mines has been the only privy party. Reports of gas analyses conducted by it were furnished the well owners, producers, and other persons providing samples, and commencing in 1928, helium was reported as a separate constituent in those analyses, although prior to that time it had been reported as part of the nitrogen content of gas. As indicated above, the first publication of gas analyses showing the presence of helium was dated 1921, a professional paper numbered 121, titled 'Helium-Bearing Natural Gas,'' by G. Sherburne Rogers.[85] There have been other publications in the United States.[86]

The constituents of natural gas found in underground reservoirs in the Hugoton area include hydrocarbon compounds, ranging from methane, the compouind lightest in

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[81] LOX 6.

[82] Helex Ex. 12.

[83] Helex Ex. 282-283.

[84] Helex Ex. 14.

[85] LPX 6.

[86] Helex Ex. 12.

molecular weight but lowest in Btu yield, through ethane, propane, normal butane, iso-butane, normal pentane, iso-pentane, and various heavier hydrocarbons. Non-hydrocarbon constituents include nitrogen, oxygen, argon, helium, hydrogen sulfide, hydrogen, and carbon dioxide. Gaseous hydrocarbons comprise by volume approximately 85 per cent of the natural gas in the Hugoton fields; the non-hydrocarbon constituents enumerated above comprise the remaining 15 per cent. Helium alone comprises, on the average, about four-tenths of one per cent of Hugoton area gas, by volume.

The composition of gas from separate wells in the Hugoton area is by no means constant. Methane, e.g., ranges from a low of 45.9 per cent to a high of 82.6 per cent; nitrogen from a high of 44.3 per cent to a low of 6.5 per cent. Helium ranges from a low of .22 per cent to .97 per cent of the total stream.[87] No gas exists in the Hugoton reservoirs which does not contain non-hydrocarbon constituents.[88]

The separate constituent components of gas in a given reservoir, and in the Hugoton area, are found in a state of random molecular diffusion; that is, separate molecules of the hydrocarbon compounds and the non-hydrocarbon elements and compounds are randomly mixed within any given pressure-connected reservoir. The diffusion may not be perfect, so that a given field, or a single well with a field, will yield a gas stream of constant and unvarying composition. Helium itself is diffused within the Hugoton area; its rate of diffusion within a single reservoir may vary among separate vertical zones, depending upon its rate of diffusion through horizontal layers of shale separating separate gas zones.[89]

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[87] Helex Ex. 18.

[88] Ibid.

[89] Tr. 42:4216 et seq.

Although found together within the Hugoton Field, and in many gas reservoirs gaseous hydrocarbons and helium originate through separate processes and they may or may not derive from the same physical source beds. Hydrocarbons are generally thought to originate from chemical breakdown and reorganization of organic animal and vegetable materials deposited on the floor of pre-historic oceans overlying the Hugoton area. Helium is thought, according to the prevailing theory, to be radiogenic, that is, to have resulted from the decay or degeneration of uranium into lead, the breakdown yielding helium atoms during the process. The source beds of helium and hydrocarbon gases are frequently identical, although there is no necessary relationship between the two. The presence of helium and gaseous hydrocarbons within the same reservoir results from their property as gases to migrate through or into porous and permeable subterranean formations.[90]

Helium has never been produced from a gas well separately and apart from the total stream of raw natural gas as it emerges from the wellhead. Other than the removal of liquefiable hydrocarbons through conventional mechanical or low temperature separators, it is economically impossible to separate the constituents of the gas stream at the wellhead, and no practical or economically feasible means has been devised to date for the wellhead separation of helium from the balance of the gas stream. Thus, the composition of the natural gas stream as it is produced at the wellhead necessarily reflects the composition of the reservoir gas.[91]

The production of natural gas from underground reservoirs is accomplished by reservoir pressure, specifically, the difference between reservoir and wellhead pressure causes gas to flow through the well bore. The stream

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[90] Ibid.

[91] Tr. 47:4545.

must necessarily be produced in its entirety, and with all the gaseous constituents randomly commingled in the stream as found in the reservoir.[92]

Helium Extraction Prior to 1960

The only extraction and marketing of helium prior to 1960 except as hereinafter noted was accomplished by the United States. It acted through its Bureau of Mines in the Department of the Interior, which has been charged by statute with helium research and development since 1925.

The first large-volume use for helium was discovered during World War I, (1917-1918) when it was found useful for inflation of lighter-than-air craft, particularly dirigibles. Prior to that War, helium had been extracted from natural gas in only very small amounts, for laboratory purposes. The first large volume extraction was done in two plants built at Fort Worth, Texas, early in 1918, known as Experimental Plants Nos. 1 and 2. A third plant, Experimental Plant No. 3, was completed and started in late 1918, at Petrolia, Texas, approximately 100 miles north of Fort Worth.

The next plant, Production Plant No. 1, was constructed at Fort Worth, Texas. Each of these plants was constructed by private firms operating under contract with either the Department of the Navy, the Bureau of Mines, or both.

Natural gas for helium extraction was furnished for these plants by the Lone Star Gas Company, a producer of gas from the Petrolia Field and a distributor in Fort Worth.[93]

The next production plant, Production Plant No. 2, was designed and built by the Bureau at Fort Worth, Texas.

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[92] Tr. 37 3719.

[93] LPX 200, 201; Helex 23, Part 1.

Although World War I concluded before helium produced in these plants could be used, production continued at Fort Worth until depletion of the Petrolia Field in 1929.

Faced with approaching depletion of that field, on May 17, 1927, the United States acquired an option for a period of two years to purchase leasehold rights in the Cliffside Field in Potter County, Texas, owned by the Amarillo Oil Company, a producer, pipeline company, and distributor of natural gas in the Amarillo area. Also on that date, the company contracted to sell and deliver natural gas to a helium extraction plant the Bureau intended to construct at Amarillo.[94]

The United States thereafter undertook to acquire both leasehold and retained royalty rights in the Cliffside Field in order to control production therefrom, to avoid pressure to increase production from royalty owners, to be free to shut in production when helium demand decreased in order to avoid the production of any gas not processed for helium extraction. Accordingly, in 1929, the United States exercised its option and began the acquisition of Amarillo's leasehold rights in the field,[96] acquiring the company's gas rights in approximately 26,000 acres of the 50,000 acre field. Leases held by Amarillo were given by W. H. Bush, the Fuqua Land & Cattle Company, and Lee Bivins. The United States acquired the Bush lessor interests by a Gas Grant dated July 19, 1930;[97] the Fuqua Land & Cattle Company interests by contract of sale dated April 17, 1930;[97] the Bivins interests by condemnation proceedings in the United States District Court for the District of Texas, covering "retained gas royalty rights" held by

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[94] LPX 202.

[96] LPX 203.

[96] LPX 11.

[97] LPX 10.

the Bivins heirs.[98] One heir of the Bivins estate claimed that the Bivins gas lease did not convey helium. This claim was rejected by the Commerce Department, and the condemnation of "gas rights" was completed, without mention of helium as a separate constituent of the gas.

By purchase or condemnation, the United States obtained lessors' retained gas in the balance of the field, gas rights to lands not under lease, and fee title to other property in the field, so that by 1933, the United States owned all gas rights in the Cliffside Field. Representative copies of oil and gas leases covering the field contain typical grants of "oil and gas" or "oil and gas, casinghead gas, casinghead gasoline."[99] Helium as such is not mentioned in any of the leases.

The only private firm to extract and market helium as a separate commodity prior to enactment of the Helium Act Amndments of 1960 was the Girdler Corporation. It operated two extraction plants, one at Dexter, Kansas, and one at Thatcher, Colorado (Model Dome). It operated these intermittently between 1927 and 1934. Gas for processing in these plants was supplied by production under leases in the plant vicinity held by Girdler itself.[100] The gas processed at Thatcher was almost wholly noncombustible, containing 85 per cent Nitrogen, seven per cent Helium, and seven per cent Carbon Dioxide. By amendment in 1937, Ch. 895, 50 Stat. 885, to the Helium Act of 1925, Ch. 426, 43 Stat. 1110, the Secretary of the Interior was directed to purchase, if possible, all properties developed or constructed by private parties for helium production prior to passage of the amendment, September 1, 1937. The Girdler plants comprised the only private helium extraction operation in the country at that

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[98] LPX 15.

[99] LPX 216(b).

[100] LPX 216(c)(d).

time, and were purchased by the United States in 1938. They were not at that time in operation, and had not been for approximately four years. The 1937 amendment did not forbid subsequent commercial helium extraction and marketing by private companies. No private firm or corporation undertook these ventures, however, until after the Helium Act Amendments of 1960.

At the commencement of World War II, thus, all helium extraction facilities were owned by the United States, and consisted solely of the Amarillo Plant. It constructed four plants during World War II, to meet the greatly increased helium demand for military requirements. The first was constructed at Exell, Texas, in 1943. Gas for both plant fuel and for helium processing was supplied from the Channing area of the West Panhandle Field under a contract of the United States with the Canadian River Gas Company (merged in 1951 into the Colorado Interstate Gas Company).[101] Wells supplying this production were drilled under a single lease granted by Lee Bivins dated May 1, 1923 covering "Oil and gas" in a 200,000-acre area.[102]

Later in 1943, the United States completed a second plant, at Otis, Kansas. Natural gas was furnished this plant, for both fuel and for helium extraction, from several small area fields under contracts with the Producers Gas Company and Northern Natural Gas Company.[103] Additional supplies of gas were furnished by the Kansas-Nebraska Gas Company under a 1952 contract, supplying gas produced in Barton and Rush Counties, Kansas.[104] The third plant to be constructed was near Cunningham, Kansas, completed in 1944, gas again for both fuel and

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[101] LPX 207.

[102] LPX 216(e).

[103] LPX 208, Helex 27; LPX 209, Helex 26.

[104] LPX 211; Helex 28.

for helium extraction being supplied by the Skelly Oil Company from the Lyons Field.[105] Again, this gas was produced under typical leases of oil and gas.[106]

The last plant built by the United States to meet wartime needs was at Shiprock, New Mexico, known as the Navajo Plant, completed in March, 1944. Helium-bearing natural gas was first furnished this plant from a well named Rattlesnake 1-G, drilled by the Continental Oil Company under a 1923 lease granted by the Navajo Tribe, which conveyed to their original grantor "oil and gas deposits" in the described property and formations. Through a series of agreements,[107] the United States subsequently acquired the lessees' interest as to certain formations under that lease, and became itself a lessee-producer of helium-bearing natural gas under the 1923 lease. This lease was construed in *Navajo Tribe of Indians* v. *United States,* 364 F.2d 320 (Ct. Cl. 1966).[108] This gas contained 7.6 per cent helium, and was non-combustible due to a high nitrogen content.

The Navajo Plant was operated initially for only 18-19 days. Later, operations indicated the Rattlesnake supply was inadequate, and the United States entered into a number of later contracts for helium-bearing gas for processing. By 1955, the Rattlesnake Field having become depleted, the United States contracted with the Stanolind Oil & Gas Company (now Pan American Petroleum Corporation) for gas produced from what is identified as the Hogback Field in San Juan County, New Mexico.[109] It executed the next contract in 1959 with the Pan American

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[105] LPX 210; Helex 29.

[106] LPX 216(g).

[107] LPX 27.

[108] See our discussion *infra*, page 77.

[109] LPX 212; Helex 30.

Petroleum Corporation covering gas produced from the Navajo C-1 well.[110] It executed a gas supply contract for the Navajo Plant in 1962 with the Continental Oil Company, covering gas produced from the Table Mesa Field.[111]

The production of helium reached a wartime high of over 137 million cubic feet in 1944.[112] Immediately after the war, production dropped to approximately 63 million cubic feet in 1946, and later dropped still further to 54 million cubic feet. Accordingly, after the war, all government plants were closed except that at Exell, Texas. Excess production of helium from Exell was first stored in 1945 in the government-owned Cliffside reservoir. The Cunningham Plant was dismantled, and the remainder were placed on standby status.

Helium demand again commenced to increase in 1950, and the government plants at Amarillo, Otis, and Shiprock were placed back in operation in 1950, 1951, and 1953 respectively. By 1952, government production reached and exceeded the previous high of 1944. In 1957, to meet the rising demand, the capacity of the Exell Plant was enlarged from 60 to 240 million cubic feet, and the government thereafter undertook the construction of the last government-owned helium plant, at Keyes, Oklahoma. It was placed in operation in 1959. Gas for this plant was supplied by the Colorado Interstate Gas Company under a contract executed April 4, 1958.[113] It was to be produced from the Keyes Field in Oklahoma.

The contracts recited above comprise all of the gas purchase contracts in this country under which natural gas was purchased by the United States with the express contemplation that helium would be removed from it. No

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[110] Helex 31; LPX 214.

[111] LPX 215; Helex 230.

[112] LPX 112.

[113] LPX 213; Helex 32.

portion of the price to be paid for natural gas was separately and expressly attributed to its helium content until the 1958 Keyes contract. The prices in all contracts prior to 1958 were the prevailing market prices for natural gas for fuel markets at the time of their execution. The Lone Star contracts supplying Experimental Plant No. 3 and Production Plant No. 1 at Fort Worth, Texas provided identical prices, though stated separately, for shrinkage resulting from the removal of helium, and shrinkage resulting from the use of gas for fuel, fifteen cents per Mcf. Contracts executed to supply the wartime plants at Exell, Texas, and at Otis and Cunningham, Kansas, all provided for payment of either seven or eight cents per Mcf for all gas processed and not returned after the extraction of helium. This total shrinkage was composed of not only the helium removed, but gas used for the generation of power and heat, i.e., fuel, hydrogen sulphide removed in the extraction process, and all other gas lost within the plant. Three of the four contracts supplying these plants recited the following respecting the extraction of helium:

> "WHEREAS, the processing of gas for helium extraction tends to improve its composition for use as fuel, because such processing not only removes the greater part of the helium, which has no fuel value, but also removes some portions of other inert gases contained in the helium-bearing gas . . . ."[114]

The 1955 Stanolind contract supplying the Navajo Plant, covering gas from the Hogback Field containing 7.5 per cent helium by volume, provided for payment of twelve cents per Mcf. plus a three cent delivery charge. This gas was not efficient fuel gas, and contained about 450 Btu's.

It was in the 1958 Keyes contract, with Colorado Interstate Gas, that the United States agreed for the first time

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[114] LPX 208, (Example).

to a payment for helium-bearing gas on a basis other than solely for the volume of gross shrinkage in the plant.[115] The price was divided into two parts, a payment of 26 cents per Mcf for "all gas consumed in the plant as fuel and for all shrinkage resulting from processing in the plant," and in addition a four cent per Mcf fee denominated a "Processing Fee:"

> "6.2. *Processing Fee*—As compensation to the company for gas processing and helium extraction rights, and for providing gas deliveries at suitable pressure, volume, and helium content, *and for the helium extracted,* the United States shall pay the Company a gas processing fee on the total volume of gas delivered to the helium plant and processed for helium extraction. Said processing fee shall be 4 cents per thousand cubic feet for gas having a weighted average helium content of 2.0 per cent during the billing period. . . . ." [Emphasis supplied.][116]

The contract provides further that "[i]f the weighted average helium content for the billing period is greater or less than 2.0 per cent, the processing fee shall be increased or decreased in accordance with the table attached hereto . . ." The average helium content of Keyes gas is two per cent by volume. This processing fee applies only to gas coming into the plant which is processed for helium removal, and is not paid when gas entering the plant is not so processed and is used merely for power.

At the time this contract was executed, Colorado Interstate purchased gas in the Keyes Field from some twenty-six companies or individuals, at a wellhead price approved by the Federal Power Commission (FPC) of fifteen cents per Mcf, which was adjusted due to low Btu content to

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[115] LPX 213; Helex 32.

[116] Ibid.

twelve cents per Mcf, upon which royalties were paid.[117] In addition, Colorado Oil and Gas Company, a wholly-owned subsidiary of Colorado Interstate, owned approximately one-half of the leasehold interests in the field, and Colorado Interstate paid this subsidiary the 12 cents adjusted price. Thus, for gas sold to the United States and used by it, Colorado Interstate paid, at the time the contract was executed, 12 cents per Mcf at the wellhead, and received 26 cents per Mcf for the gas used by the United States.

It is disputed whether the additional four-cent "processing fee' constitutes a payment for helium. Dr. Seibel, then with the Bureau of Mines, stated that the processing fee covered a "number of items which the government felt were quite valuable," including a guarantee of ownership of helium, a limitation on daily gas withdrawals from the field, obligations of the seller to minimize dilution of the helium content of the gas, an agreement to maintain fixed delivery pressure at the plant inlet regardless of variations in field pressure, and the exclusive right to process all Keyes gas for helium extraction.[118] Mr. Charles Wheeler of the Bureau of Mines characterized this fee thus:

> "In effect, this four cent processing fee assigns a market value of $2.00 a thousand cubic feet. Whether it was intended to do that or not that is initially what we got for the four cent processing fee, helium at $2.00 a thousand cubic feet."[119]

The two-dollar figure mentioned above does not appear in the Keyes contract. It may, however, be calculated therefrom. The Keyes gas constitutes two per cent helium by

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[117] LOX 60.

[118] Tr. 63:6038-6039.

[119] Tr. 66:6310.

volume. To obtain one thousand cubic feet of helium, thus, it is necessary to process 50,000 Mcf of gas. The processing fee for that quantity, at four cents per thousand cubic feet, equals two dollars. In other words, the contract requires that the United States pay the company $2.00 for the right to process sufficient gas to yield one thousand cubic feet of helium.

The next contract following the Keyes agreement was executed by the United States with Pan American on June 12, 1959, supplying the natural gas with about 5.6 per cent helium by volume, to the Navajo Plant.[120] It provided for payment as follows:

> "10.1 The price of gas delivered and sold by Company to the United States during the terms and under the conditions of this agreement, shall be nineteen (19) cents per one thousand (1,000) cubic feet, which price is made up of the following:
>
> | | |
> |---|---|
> | Helium | 11.6 cents |
> | Hydrocarbons | 1.8 cents |
> | Delivery | 5.6 cents |
> | | 19.0 cents" |

Mr. Wheeler of the Bureau testified that this attribution of 11.6 cents to the helium content of the gas was based upon the "formula" established in the Keyes Plant: that the value of two cents per one per cent of helium content was applied to a gas containing 5.8 per cent helium, resulting in a price of 11.6 cents per Mcf.

The two dollar figure referred as the "Keyes formula" has been considered in the United States contracts with the Helex companies. The formula is discussed in connection with our analysis of such contracts.

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[120] LPX 214; Helex Ex. 31.

Helium Conservation

Helium produced prior to 1960 was used primarily to meet current demands of both governmental and civilian users. These demands had risen sharply during the 1950's. From 1948 until 1956, helium sales increased five-fold.[121] This increase was due to the rapidly multiplying uses being developed for helium.

Its first large-volume use was as a lifting gas for lighter-than-air craft, commencing immediately after World War I. Prior to World War II, small but important quantities were also used in diving and submarine operations, and for medical purposes. During World War II, it became important in atomic energy and as a shield in arc-welding of such metals as magnesium, aluminum, and stainless steel. It is essential for much nuclear and cryogenic research, and its industrial applications are more numerous than ever before.

The conservation of helium was particularly a matter of federal concern. In 1955, 70 per cent of all helium produced by the Bureau was used directly by federal agencies, particularly the Department of Defense and the Atomic Energy Commission. At that time, projects involving over $6,000,000,000 were estimated to depend upon continued helium supplies. Over half of the remaining 30 per cent was used by private purchasers in work under government defense and atomic energy contracts.

As increasing helium demands threatened to outstrip the production capacity of the Bureau, concern arose that sudden defense mobilization requirements could not be met, and attention turned to both providing increased production capacity and the use of other helium sources, including

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[121] LPX 43, Report prepared in 1956 by Dr. C. W. Seibel, then Asst. Director of the Bureau of Mines, in charge of helium, titled "Helium — Uses — Requirements — Production — Conservation — Costs." p. 2.

the Hugoton and Panhandle Fields. A 1953 report of the Office of Defense Mobilization reported that in 1952, "more than seven million cubic feet of helium a day was going out of the western part of the Texas Panhandle Field in nine pipelines. . . ."[122] Further,[123] a report prepared in 1954 for the Bureau of Mines by a private engineering firm, called the Stone & Webster Report, was concerned primarily with developing adequate reserves and production capacity to meet any sudden military demand.[124] By 1956, the concern for helium was twofold, both to meet mobilization needs and to conserve an increasingly valuable and wasting natural resource.

Helium carried in natural gas to fuel markets does not burn, of course, and simply passes into the atmosphere at the burner tips. It constitutes approximately 1/200,000th part of the atmosphere and no economical method has been developed for its recovery from the air. Carried in the natural gas, it produces no heat. Moreover, it reduces the Btu yield of a gas stream by absorbing heat itself, sufficient to raise its temperature to that of the burner. The 1954 Stone & Webster Report stated that under then current natural gas production schedules, approximately two-thirds of the helium supplies would be dissipated within the next twenty years.

In 1957, a helium policy "working group", headed by then Undersecretary of Interior O. Hatfield Chilson, was constituted to determine how a national preservation policy should be implemented, and its cost. In its report in 1958, referred to as the Chilson Report, that group concluded that the "only practical method of conserving the large volumes of helium currently wasted to the atmosphere is

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[122] LOX 40, p. 12.

[123] LOX 42.

[124] LOX 42; See also a 1955 Bureau of Mines Report, "Helium—a Report for the Secretary of the Interior." LOX 47.

to construct and operate helium plants to extract the helium from helium-bearing natural gas before it is transmitted to fuel markets. . . ."[125] The basic plan of conservation was stated thus:

> "Ninety-nine per cent of the known helium-bearing natural gas resources in the United States is concentrated in four fields: (1) the Hugoton field of Texas, Oklahoma, and Kansas; (2) the Panhandle field of Texas; (3) the Keyes field of Oklahoma; and (4) the Greenwood field of Kansas. All of these fields have been developed by private companies to supply natural gas to fuel markets, and they are presently being produced for that purpose. So far as the gas companies are concerned, the helium is a minor impurity, and no effort is made to remove it. Consequently, the helium is transmitted to fuel markets along with the rest of the gas, and it eventually passes through the gas burners into the atmosphere without serving any useful purpose.
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> "The Hugoton, Panhandle, Keyes, and Greenwood fields contain approximately 119 billion cubic feet of potentially recoverable helium. About 60 per cent of this helium could be recovered in 13 helium plants located at strategic points on pipelines leading from the fields. . . ."[126]

The report also suggested helium thus recovered could be stored at Cliffside until withdrawn and refined to meet current demands of the United States and private companies.

The role of private industry in any helium program to be undertaken was considered as early as 1954, in the Stone & Webster Report, in which it was discouraged as

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[125] LPX 56, p. 10.

[126] LPX 56, p. 10-11.

inconsistent with the United States' paramount interest in helium. Again in 1957, Dr. Seibel wrote that "[p]rivate industry participation in the direct production of helium at this time will jeopardize future supplies of the important strategic commodity—helium, cost the taxpayers many millions of dollars annually, require the establishment of a Government commission to regulate the industry and involve heavy subsidies."[127] In 1958, however, the Chilson report recommended that private industry be given an opportunity to participate in the helium conservation program, but that a "completely private helium industry," resulting in promotion and sale of helium without regard to beneficial end uses, be avoided. Accordingly, it recommended that "the most satisfactory form of private participation would involve the purchase by the Government of all of the helium produced privately."[128] The Chilson Report was submitted to President Eisenhower and approved. The President thereupon promulgated a National Helium Conservation Policy, announced by the Secretary of the Interior on May 1, 1958.[129] In this press release, the Department stated: "Recovery of the helium from gas going to fuel markets will be accomplished in up to 12 plants, . . . to be constructed in or near the fields that produce the gas."

Thereafter in 1958, the Interior Department proposed legislation to Congress for the implementation of this conservation policy. This was not acted upon, and redrafted proposals were submitted again in 1959. With certain alterations, on September 13, 1960, the Helium Act Amendments were enacted, amending and replacing the Helium Act of 1925.

The 1925 Helium Act, Ch. 426, 43 Stat. 1110, was not itself a conservation act. It authorized the Secretary of

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[127] LPX 45.

[128] LPX 56, p. 15.

[129] LOX 81.

the Interior "for the purpose of producing helium with which to supply the needs of the Army and Navy and other branches of the Federal Government . . . to acquire [helium-bearing] land or interest in land . . . where necessary, when helium can not be purchased from private parties at less cost . . . ." The Act provided that all branches of the federal government could fill their helium requirements by purchases from the Bureau at "actual cost of said helium to the United States, including all expenses connected therewith . . . ." The leasing of surplus helium to private parties was authorized. An amendment in 1927, Ch. 355, 44 Stat. 1387, authorized the sale or leasing of a maximum of 5,000 cubic feet of non-surplus helium annually to aid scientific and commercial development. In 1930, the Comptroller General issued a ruling requiring the Navy Department and perhaps all other federal branches, to meet their helium needs by purchases from the Bureau. By Act of September 1, 1937, Ch. 895, 50 Stat. 885, amending the 1925 Helium Act the Secretary of the Interior was directed "if possible under the terms hereof" to acquire all properties developed or constructed by private parties prior to that time for helium production. It was pursuant to this authority as we said that the Girdler Corporation plants were purchased by the United States. The 1937 amendments also authorized the sale of helium for medical, scientific, and commercial purposes which was not needed for government use, such sales to be at "reasonable prices . . . based upon the cost of acquiring, developing, maintaining, and operating the Government properties . . . ."[130]

The 1960 Helium Act Amendments, 74 Stat. 918, 50 U.S.C.A. §§ 167 et seq., authorized the Secretary of the Interior to enter into long-term contracts for the acquisition, processing, transportation or conservation of helium, not exceeding twenty-five years. In addition, he was given

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[130] See LPX 32, Fig. 4, for graph outlining charges for helium to both federal and non-federal users.

the power to acquire, by eminent domain, helium contained in helium-bearing natural gas and so much of such gas as is necessarily removed in the extraction process, if he were unable to acquire helium otherwise upon reasonable terms and at the fair market value. The Amendments provided a new basis for establishing the price of helium sold by the Bureau. Whereas under the 1937 amendment, the price was to be based on the actual cost of helium to the United States, including all expenses connected with its production, the new price under the amendment was to be adequate to recover, within twenty-five years, all funds expended in the entire conservation program. This price was subsequently set by the Secretary at $35.00 per Mcf, the price at which helium is sold to both federal and non-federal users. The Amendments required that all contracts made by the Secretary for the purchase of helium from private plants contain provisions forbidding the sale of helium to any purchaser other than the United States at a price lower than the lowest price paid by the United States for helium produced from any private plant. The Amendments required further that all agencies of the federal government purchase their major requirements of helium from the Secretary, to the extent that supplies were readily available.

United States Helium Contracts

In 1960, directly after enactment of the Helium Act, the Bureau of Mines began to solicit the interest of private industry.

The number of parties who were in positions which permitted them to participate in the conservation who had the financial ability to perform a large government contract, was necessarily limited. Participation required that the contractor have in his control or access to, large volumes of gas with sufficient helium content to permit economical extraction, and in addition, ownership of such helium-

bearing gas streams, or at least the right to extract helium therefrom.

On October 11, 1960, the Bureau sent identical letters to 377 persons and firms who had indicated interest in the program.[131] On October 25, 1960, the Department promulgated guidelines by which proposals were to be evaluated.[132] The Bureau judged proposals on four criteria: how much helium conservation could the proposal assure, how soon would it be accomplished, the probable cost of such conservation, and the ability of the company to perform as proposed.[133]

Of fourteen proposals received by the government, twelve proposed to build and operate helium extraction plants.

After exploratory interviews with each of these twelve firms conducted by a five-man board constituted to evaluate and select companies for actual contract negotiations, four companies were selected on March 6, 1961, three being parties to these cases, Cities, Northern, and Panhandle.

Negotiations with these firms led ultimately to execution of contracts with their respective helium extraction subsidiaries: with Helex, Inc. (now Northern Helex, Inc.) on August 15, 1961; with Cities Service Helex on August 22, 1961; with National Helium on October 13, 1961. On August 21, 1961, the Bureau renewed its request for proposals from private industry to be submitted by September 15. Phillips thereupon submitted a new or altered proposal, which led to contract executed November 13, 1961.

From the announcement of the program in May, 1958, through execution of the last contract implementing it, the Bureau of Mines and Interior Department issued a total

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[131] Helex 170; Tr. 66:6347.

[132] LOX 120; Helex 171.

[133] LPX 91, App. 21.

of 11 press releases, announcing every major step toward implementation of the program.[134]

At no time during the formulation, promotion, or implementation of the conservation program did either the Bureau or the Department seek to discourage participation by any member or segment of the petroleum industry, including both pipeline companies and producing companies.

Lessee-producers allege that representatives of the Bureau of Mines commenced preliminary discussion and negotiations with Northern, Cities, and Panhandle and others controlling large volumes of helium-bearing gas, as early as 1958, long before enactment of the Amendments in 1960.

The evidence introduced to establish these negotiations [135] simply does not do so. Representatives of Northern and Cities consulted with the Bureau concerning the possibility of their participation.[136] No negotiation of contracts was conducted by the Bureau with any company prior to 1961, following public solicitation of proposals from private companies.

Lessee-producers complain of alleged pre-selection of sites for helium extraction plants. Commencing in 1956, discussions of alternative approaches to helium conservation within the Bureau contain repeated references to a projected twelve or thirteen plants, which could recover 60 per cent of the helium transported from the Hugoton area in natural gas carried to and wasted in the market. These sites were but recommendations, and no site selection was imposed upon any party seeking to participate in the program.[137]

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[134] Helex Ex. 59, 161, 166; LOX 117, 119, 120, 122, 127.

[135] LPX 57, 73, 80, 117, 118, 127, 128, 129, 145, 146 and 173; LOX 84; Tr. 79:7571.

[136] LPX 80, 117, 118.

[137] Tr. 67:6376.

Copies of a May 1, 1958, press release were sent to Cities Service Gas and Panhandle on May 6 after its issuance accompanying requests for gas samples and data regarding gas flows, pressures and seasonal variations in lines owned or controlled by these companies. The evidence discloses no preferential treatment given these or any other companies in announcement of conservation plans.

Helium which the United States purchases from each of the four extraction contractors is contained in a crude helium-gas mixture, which the contracts define as "the gaseous product resulting from the helium extraction operation . . . [and] comprised of helium predominately together with other constituents of the natural gas." In actual operations, the delivered gas mixture consists of about 70 per cent helium and 30 per cent nitrogen. This gas mixture is transported through a small diameter pipeline to Texas, where it is stored in the Cliffside underground reservoir. When needed, it is withdrawn and refined, prior to sale to about 99.99 per cent purity.

The prices stated in the contracts apply only to the volumes of helium *contained in* the helium-gas mixture, and not to the mixture itself.

The contract with Helex, Inc., provided for an initial unit price of $11.24 per Mcf for helium contained in the crude helium gas mixture delivered to the United States. Northern Helex produces this helium mixture in a plant at Bushton, Kansas, on pipelines of Northern Natural leading from the Hugoton area, commencing operations in December, 1962.[188]

The Cities Service Helex contract provided an initial price of $11.74 per Mcf which price has risen, pursuant to adjustment provisions in the contract, to approximately $12.23 at the time of trial. This helium is extracted at a plant constructed in Grant County, Kansas, on pipelines

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[188] LPX 105.

of Cities Service Gas, leading from the Hugoton area, operations commencing in June, 1963.[139]

Under the National Helium contract, the United States agreed to a price of $11.78 per Mcf of contained helium, which had risen to approximately $12.35 at the time of trial.[140] This helium is extracted at a plant at Liberal, Kansas, located on pipelines of Panhandle leading from the area, commencing operations in July, 1963.

The contract with Phillips provided a price of $10.30, which, like the other contracts, is subject to escalation, although the present price is not disclosed. Helium sold thereunder is extracted in two plants, one in Sherman County, Texas and the other at Dumas, Texas, these commencing operations in December, 1962 and April, 1963, respectively.

Under each of these contracts, the United States is obligated to purchase the total helium production of each company for a period of twenty-two years, this obligation subject to the limitation that the United States' purchases are not required to exceed specified annual dollar maxima: $9,500,000 in the Helex contract; $9,100,000 in the Cities Service Helex contract; $15,200,000 in the National Helium contract; and $13,700,000 under the Phillips contract.

The United States negotiated the above unit prices in each contract on the basis of costs comparable to those it would incur in a government-owned plant located at the same place and in the same circumstances, adding thereto those costs of doing business applicable only to private industry, the cost of taxes, insurance and a return on private capital. As one of the costs of operating a government-owned plant, the United States included in its cost build-up a payment of $2.00 for helium contained in

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[139] Tr. 74:7070; LPX 106.

[140] Tr. 71:6789.

natural gas delivered at the extraction plant for processing.[141] This separation of two dollars of the unit price as applicable to the cost of helium contained in natural gas to be processed for its extraction does not appear in any contract itself. It appears only in evidence which reflects the manner in which the United States reached its own cost estimates to form a basis for actual contract negotiation. The figure reflects no more than the estimate of the Bureau of Mines of the cost it would probably incur, in the operation of its own extraction plant, to acquire helium extraction rights from a natural gas stream.

The contract unit price in each case is stated in two parts, Part One representing the cost of natural gas to the extraction company. [E.g., in the Cities Service Helex contract, it represents the "cost in the field of shrinkage and fuel gas," these being the "shrinkage in the volume of natural gas occurring as a result of the heium extraction process . . . and any such natural gas consumed as fuel . . ." A similar provision is contained in the National Helium contract.]

Part Two, the greater part of the price, represents the balance of the unit price. Respecting the total unit price, the contracts provide:

> "Payment for the helium-gas mixture sold and purchased hereunder shall be calculated and made on the basis of the contained helium therein. The unit price specified herein represents only the value of the contained helium and is applicable only to such contained helium. For the purposes of this contract, no value has been ascribed to gaseous products other than helium in the helium-gas mixture sold and purchased hereunder. Notwithstanding the foregoing, it is expressly understood and agreed by both parties hereto that payment in accordance with this article shall constitute full and complete payment for helium,

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[141] See, e.g., LPX 91, App. 33.

nitrogen, methane, and any and all other constituents of the helium-gas mixture." [142]

The two parts are based on separate adjustment scales, Part One on the basis of the extraction companies' cost of gas, and Part Two according to the wholesale price index, exclusive of food and farm products.

The question of title to helium arose during negotiations. In each contract, the seller warranted title to the helium-gas mixture, or agreed to indemnify and hold harmless the United States for all claims of ownership by third parties to said mixture. The ultimate cost each seller might have to bear as a result of failure of title is limited, however, by provisions that the seller be reimbursed by the United States for all payments made in satisfaction or settlement of ownership claims to helium, to the extent that such payments exceed approximately $3.00 per Mcf of helium.

The contracts provide, in addition, that should seller's title to helium fail and seller cannot perfect it, that the United States is entitled to terminate the contract and to purchase the extraction plant itself.

Two contracts are in evidence under which gas is acquired for the extraction of helium therefrom, in which the two-dollar figure derived from the Keyes formula actually appears as payment for helium, both executed in 1965. Under a "Gas Exchange Agreement" between Phillips and Pioneer Production Company, Pioneer delivered to Phillips certain volumes of raw natural gas produced from the West Panhandle Field, Pioneer granting to Phillips the right to process the gas for helium extraction in the following language:

"*Section 1.* Subject to the other provisions hereof, Phillips is granted the right to process all gas delivered to Phillips . . . and to remove any constituents therefrom so long as the gas which Phillips redelivers

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[142] E.g., LPX 107, p. 9.

at Delivery Point 'B' complies with the specifications set forth in Section 2 . . . ."

"*Section 2.* As total consideration for such processing rights Phillips agrees to pay Pioneer a price of two dollars ($2.00) per Mcf for the Helium contained in the raw gas attributable to the residue gas Phillips delivers at Delivery Point 'B.' "[143]

So far as appears, this helium is subject to sale to the United States under Phillips' contract.

Likewise, under a gas sales agreement executed April 1, 1965, between Colorado Interstate Gas Company and Alamo Chemical Company, a wholly-owned subsidiary of Phillips, Colorado Interstate granted to Alamo the right to extract helium and liquefiable hydrocarbons, from gas produced principally from the Greenwood and Sparks Fields in Kansas. Alamo agreed to pay Colorado Interstate "Two Dollars ($2.00) per Mcf for the contained helium extracted and saved at the Greenwood Plant, as determined under Article VII hereof."[144]

The foregoing history and development of helium extraction from natural gas constitute basic facts which we must consider in determining landowners and lessee-producer contentions of their rights to the fund and landowners claims against the United States.

We turn to the Leases.

The Leases

As indicated at the outset of this memorandum, both landowners and lessee-producers argue that the extraction companies have no right, title or interest in the helium contained in the helium-gas mixtures delivered to the United States, or in any other non-hydrocarbon portion of that mixture. The landowners claim that helium did not pass to their lessees under the oil and gas leases by virtue of

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[143] Helex Ex. 112, p. 4.

[144] Helex Ex. 113, p. 26.

which natural gas has been and is being produced from their properties. The lessee-producers oppose this position, and urge that helium did in fact pass under those leases, but that it passed no further, i.e., that it did not pass to the pipeline companies under the gas purchase contracts by which they acquire natural gas from which helium is extracted.

We turn first to the arguments of the landowners, most of which are based primarily upon the granting language of the leases. Prior to trial, Ashland moved for summary judgment on the issue that oil and gas leases convey helium as a matter of law. This motion was overruled, in order that the court might consider evidence bearing upon the intention of the parties. In *Whitebird* v. *Eagle-Picher Company,* 390 F.2d 831 (10th Cir. 1968), the Court stated thus:

> "The vital and primary issue . . . turns upon the interpretation of the language of the leases. It has been observed that today's leases are generally both a conveyance and a contract and therefore, that it is 'more likely that a written lease is intended to be a complete and operative integration of agreement. [Footnote omitted.] 3 Corbin, Contracts § 587, at 503 (1960): 'Even when a contract has been fully "integrated" in the form of written words, those words never have a single, necessary, legally imposed meaning, unaffected by the other words and acts of the parties whether antecedent or subsequent. Those other acts and words are admissible in evidence, to discover both the meaning that one party intended and the meaning that the other party received.' Id. § 538, at 71. Therefore, although evidence which will vary, alter or contradict the express written provisions of the written leases cannot be considered, American Crystal Sugar Co. v. Nicholas, 124 F.2d 477 (10th Cir. 1941), evidence which aids in the interpretation of the leases' language and indicates the meaning the

parties intended and received may be considered. [Citations omitted.]" 390 F.2d at 834.

Accordingly, the court has received and considered much evidence of the development of gas production in the Hugoton gas area, leasing and production practices, and of the composition of natural gas, much of which has been considered in foregoing sections. Such matters are properly considered under the Restatement of Contracts, § 230, which provides as follows:

> "The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person *acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration,* other than oral statements by the parties of what they intended it to mean." [Emphasis supplied.]

See *Southwest Kansas Oil & Gas Co.* v. *Argus Pipe Line Co.*, 141 Kan. 287, 291, 39 P.2d 906, 909 (1935). We turn to the language of the leases themselves.

Representative forms under which each named lessee-producer produces helium-bearing natural gas have been compiled with tabulations of acreages covered thereunder. The parties have stipulated that these compilations and tabulations are correct as to the named lessee-producers.[145]

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[145] "The number of leases on each lease form and the number of acres covered by each form are correctly stated and shown in the forms and statements filed in this action or related actions by named party lessee-producers. The unit designations, gas unitization agreements, pooling orders (or equivalent), gas division orders and stipulations of royalty ownership and the like attached to said statements are representative of the forms used by the respective parties submitting the same. Such forms and statements may be received in evidence in lieu of the introduction of each original instrument." (Pretrial Order, p. 11).

Many thousands of leases are involved herein, with over 150 different printed forms. Over seventy-five per cent of the leases have been executed since 1940. Leases held by named lessee-producers contain a total of fifty different granting clauses.[146] Six of these clauses are found in leases covering over ninety per cent of the acreage involved:[147]

KANSAS AND OKLAHOMA LEASES

	Percentage of Acreage
"oil and gas, casinghead gas and casinghead gasoline"	69.688
"oil, gas, casinghead gas, caseinghead gasoline and all other gases and their respective constituent vapors"	10.132
"oil and gas"	7.144
"oil, distillate, gas, casinghead gas, casinghead gasoline and all other gases and their respective constituent vapors	3.311
	90.275

TEXAS LEASES

"oil and gas"	39.860
"oil, gas and all other minerals"	25.517
"oil and gas, casinghead gas and casinghead gasoline"	14.545
"oil, gas, and all other minerals"	14.168
	94.090

Leases covering 99.99 per cent of the acreage involved herein contain the words "oil" and "gas". This conjunction of terms forms the heart of landowners' argument.

Of the fifty different granting clauses, landowners regard only five as conveying helium as part of the gas granted therein:

> "(21) oil, gas, sulphur and all other minerals (whether or not similar to those mentioned)."

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[146] LOX 838; see also LPX 237.

[147] LOX 838, Schedules II and III.

"(22) oil, gas, distillate, condensate, uranium, thorium, salt, sulphur and all other minerals, whether similar or dissimilar to those mentioned."

"(44) oil and gas, including casinghead gas, casinghead gasoline, condensate, and all related hydrocarbons and including all products produced therewith."

"(48) oil or gas, or both, including, but not as a limitation, casinghead gas, casinghead gasoline, gas-condensate, (distillate) and any substance, whether similar or dissimilar, produced in a gaseous state."

"(50) oil, gas, gas condensate, gas distillate, casinghead gas, casinghead gasoline, and all other gases and their constituent parts and other minerals produced in connection with oil and gas operations hereunder." [148]

Their interpretation of these five clauses rests upon language therein which specifically covers all gaseous substances without regard to their similarity or dissimilarity to "gas" in the phrase, "oil and gas."

The word, "gas", has two different meanings with which we are concerned. As a general term used in a physicist's sense to describe a state of matter, it is defined typically as an "aeriform fluid having neither independent shape nor volume but tending to expand indefinitely." [149] It is also used to describe natural gas, which is defined typically in mining and petroleum industry glossaries as "a mixture of gaseous hydrocarbons found in nature. . . ." [150] Nothing in the history of the word "gas" itself supports the argument that it defines only gaseous hydrocarbons. The

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[148] LOX 838, Schedule I.

[149] LPX 241.

[150] Ibid.

word "gas" was coined in the early 17th century by a Dutch chemist, J. B. Von Helmont, from the Greek word "chaos" to signify a "spirit not capable of being coagulated." It later came to mean an "aeriform fluid" used synonymously with air, and was subsequently restricted to permanently elastic fluids such as oxygen and hydrogen, as opposed to vapors, such as steam. In the 19th century, it became common parlance for a mixture of carbureted hydrogen used to give heat and light, i.e., artificial gas. Gas as used to defined natural gas, did not appear as a dictionary entry until 1914, after which time natural gas was commonly described as combustible gas formed in and issuing from the earth's crust. The term, "natural", became affixed to gas to differentiate its superior fuel and illuminating qualities from artificial gas.[151]

Landowners' arguments that the term, "gas", as it appears in the leases is limited to gaseous hydrocarbons are fivefold. We treat each separately.

First, landowners argue that the Kansas Supreme Court has ruled, albeit by way of dicta, that helium is not conveyed by mere grant of "gas" and that this Court is bound thereby. In *Gilmore* v. *Superior Oil Co.*, 192 Kan. 388, 388 P.2d 602 (1964), the Court stated:

> "Construction of oil and gas leases containing ambiguities shall be in favor of the lessor and against the lessee. (2 Summerson Oil and Gas, perm. ed., § 372, p. 485; *Stady* v. *The Texas Company,* 150 Kan. 420 Syl. ¶ 2, 94 P.2d 322). It is puzzling to understand why the above textwriter had such difficulty with this rule for the reason that the lessee of an oil and gas lease usually provides the lease form or dictates the terms thereof, and if such lessee is desirous of a more complete coverage of the marketing of oil, gas, liquid hydrocarbons, or even helium gas, which has recently been found to exist in the minerals underlying the vast

[151] Tr. 12:1092 et seq.

> Hugoton field, the lessee has the opportunity to protect itself by the manner in which it draws the lease. Much more could be said on this point but extension of the discussion would be pure dictum and of no benefit to the bench, the bar, or the oil and gas industry." 192 Kan. at 391.

Conceding the foregoing is but dicta, landowners assert that this constitutes a clear and intentional statement by the Supreme Court of Kansas that an oil and gas lease does not convey helium unless it expressly so provides, citing *Curtis Publishing Company* v. *Cassel,* 302 F.2d 132 at 135 (10th Cir. 1962); *Whitaker* v. *Texaco, Inc.,* 283 F.2d 169 at 174 (10th Cir. 1960); *Jess Edwards, Inc.* v. *Goergen,* 256 F.2d 542 (10th Cir. 1958).

In each of the cited cases, the court held that federal courts, in diversity cases, must follow a "clear and unequivocal exposition of the law" in state court decisions, and that the force of statements could not be disregarded merely because they were dicta, and not necessary to the decision, following *Hawks* v. *Hamill,* 288 U.S. 52, 53 S.Ct. 240, 77 L.Ed. 610 (1933). We do not, of course, question the rule. We cannot concede its applicability here. The cited statement from the *Gilmore* case is in no way a clear and unequivocal statement that the meaning of "gas" in an oil and gas lease is ambiguous as to the coverage of any gaseous constituent in the reservoir.

Failing this, landowners argue that nonetheless, the word "gas" is ambiguous, and that such ambiguity must be resolved against the lessee. The alternative meanings alleged to constitute this ambiguity are the so-called "physicist's meaning," descriptive of a state of matter, and an alleged industry usage of the term "gas" to mean a mixture of gaseous hydrocarbons. Evidence offered to establish this usage simply failed to do so. Virtually no naturally-occurring gas in underground reservoirs exists in the entire Hugoton and Panhandle fields which conforms to this alleged usage. It was stipulated that in all instances, the

gas which comes out of the wells is a continuous uninterrupted stream of gas emanating from the wellhead and remains such during its transmission to the helium extraction plants of each plaintiff extraction company.[152] No natural gas company, pipeline or producer, in the Hugoton area handles any unprocessed natural gas which is a physically and chemically pure hydrocarbon mixture. We cannot accept, as an industry usage, a definition which is so remote from the realities of that industry.

We must find, therefore, that the word "gas" as it appears in oil and gas leases is not ambiguous by reason of the alternative meanings recited above. We would note that did such usage exist, there would be no reason to apply it to oil and gas leases. By landowners' own evidence, from a random sampling of 984 leases, it appeared that 65 per cent of the sample was taken by independent lease brokers, and not by representatives of the producing industry.[153]

Thirdly, landowners rely upon the rule of *ejusdem generis,* whereby a general term in a series may be given a limited meaning by other specific words therein. Oil, it is argued, is synonymous with petroleum, which means liquid hydrocarbons; it is followed in 99.99% of the leases by gas, a term which, in its most general application, signifies any substance existing in a gaseous state regardless of composition. Being conjoined with oil, it cannot be held to have been used generally, but specifically, to convey only those gases similar to oil, i.e. those hydrocarbon compounds in a gaseous phase.

This argument was raised and rejected in *Navajo Tribe of Indians* v. *United States,* 364 F.2d 320 (Ct. Cl. 1966), wherein the court states:

> "Plaintiff argues that, under the rule of *ejusdem generis,* the term 'gas' in the granting clause is limited to

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[152] Dkt. 59, W-3009.

[153] LOX 794; Tr. 4:284 et seq.

> hydrocarbons, i.e., gases associated with oil. We see no reason to apply *ejusdem generis* to a phrase such as 'oil and gas,' and plaintiff cites no authority for doing so." 364 F.2d at 327.

We likewise think the argument is without merit. The word "oil" used in its ordinary, common, general and popular sense in oil and gas leases refers to crude oil as it is produced from the mouth of the well. See *Hammett Oil Co.* v. *Gypsy Oil Co.*, 95 Okla. 235, 218 Pac. 501 (1921). There is no evidence that crude oil is a physically and chemically pure mixture of hydrocarbon compounds. That oil, in the sense of petroleum, for which landowners contend, is a mixture of hydrocarbons and other substances is a fact of which the court may take judicial notice. Petroleum is defined in Webster's Third New International Dictionary as follows:

> "1. : An oily flammable bituminous liquid that in the crude state often has a very disagreeable odor and may vary from almost colorless to black but is usu. of a dark brown or greenish hue and sometimes fluorescent, that occurs in many places in the upper strata of the earth either in seepages or in reservoir formations from which it is obtained by drilling and pumping if necessary, that is essentially a complex mixture of hydrocarbons of different types with small amounts of other substances (as oxygen compounds, sulfur compounds, nitrogen compounds, resinous and asphaltic components, and metallic compounds), that is sometimes classed as paraffin-base, asphalt-base or naphthene-base, or mixed base . . .
>
> 2: any of various substances (as natural gas or shale oil) similar in composition to petroleum."

We must conclude, first, that resort to the rule of *ejusdem generis* is neither appropriate nor justified to determine the meaning of the word "gas", and secondly, were it properly

applicable, the term "oil" provides no limitation upon the kinds of gases conveyed under the leases.

Moreover, the rule of *ejusdem generis* is but "merely a phase of the more general rule that the contract must be interpreted as a whole," and "frequently must yield to other more pressing considerations." 3 Corbin on Contracts, § 552. Literal application of the rule was sought *In re Estate of Trester,* 172 Kan. 478, 241 P.2d 475 (1952), to include clay with a grant of "oil, gas and other minerals." The Court rejected this argument:

> "It is true that in classifying things as animal, vegetable and mineral, everything that goes to make up the earth comes within the general classification of minerals. But this general classification cannot be used for the interpretation of instruments granting specific rights. With respect to that matter the term 'mineral' is not a definite one capable of universal application. It is susceptible to limitations according to the intention of the parties using it, and in determining its meaning in a specific instrument not only the language of the instrument in which it occurs but also the relative positions of the parties interested and the substance of the transaction which the instrument embodies must be taken into account." 172 Kan. at 482-483.

"[T]he rule of adjusdem generis [sic] is not properly applicable where the result would be contrary to the plain and clear intention of the parties." *Cronkhite* v. *Falkenstein,* Okla., 352 P.2d 396 (1960).

The landowners introduced much testimony to show precisely that landowners had *no* intention whatever respecting helium, and moreover that "gas" or "natural gas" would evoke no association with helium. Dr. Bergen Evans, a noted professor of English, etymologist and lexicographer, canvassed a compilation of 270 dictionary and en-

cyclopedia entries concerning "gas" and "natural gas"[154] and noted the relative infrequency with which helium is mentioned in relation to either term. He concluded thus:

> " . . . I conclude as a lexicographer, not as a geologist or an oil man or a signer of leases, simply as one who has examined the words, on the basis of the 270 dictionary and encyclopedia entries concerning 'gas' and 'natural gas' . . . the said entries appearing over a period of more than fifty years, that the ordinary man could not be reasonably expected to connect 'helium' with 'natural gas.' "[155]

He also examined a series of newspaper searches, one covering certain Kansas newspapers, particularly in Liberal and Hutchinson,[156] and another covering newspapers published in Guymon, Oklahoma,[157] between 1920 and 1960. In the Kansas newspapers, helium was mentioned in 163 items over this forty year period, and in 36 items in the Oklahoma newspapers.[158] By extrapolation to demonstrate the lack of association between the two words, he found that the word "gas" appeared singly or in the phrase "natural gas" approximately 213,302 times, and helium, 1,010 times. He concluded, thus, that "the word 'helium' was a very rare word; that the word 'gas' was an exceedingly common word with the implication that 'gas' was very much in the thought of the people in this area at that time, that 'helium' rarely was."[159]

Again, from an examination of a collection of 1,042 articles or excerpted items from 28 daily newspapers and 22

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[154] Helex 128, Parts 1-3.

[155] Tr. 13:1160.

[156] LOX 776 thru 786.

[157] LOX 788.

[158] Tr. 11:904; 12:1040.

[159] LOX 789; Tr. 13:1148.

periodicals in which the word "helium" appeared,[160] he again concluded that "the association of 'helium' with 'natural gas' or the word 'gas' in the sense of 'natural gas' has over the last 65 years been exceedingly rare."[161]

Dr. Evans' opinion that the word "gas" did not connote helium to the average lessor or landowner in Southwestern Kansas, Western Oklahoma or Northern Texas, between 1916 and 1960, is based upon the statistical incidence of the two words and the relative frequency of their association in dictionaries, encyclopedias, area newspapers and selected magazine articles.

The evidence seems clear that gas did not connote helium specifically to the average lessor, and that no landowner specifically contemplated helium in granting rights to produce "gas." Similarly, however, there is no evidence that any landowner regarded oil as a physically pure mixture of liquid hydrocarbons, or regarded "gas" as composed solely of hydrocarbons. It would be the sheerest fiction, in our view, to apply the rule of *ejusdem generis* to determine that the average lessor intended *not* to convey helium, when other evidence establishes that he had no intention whatever respecting it.

This question of intention, however, leads to the landowners' fourth argument, which may fairly be summarized as follows. The value of natural gas lies primarily in its suitability for use as a combustible fuel; however, helium is valueless as a constituent of the fuel stream, and the average landowner or lessor could not have intended to convey helium as a part of the gas stream.

The end uses of natural gas produced in the Hugoton and Panhandle fields, however, are not limited to fuel alone, and the economic value of natural gas does not lie in its combustible or hyrdocarbon properties alone. The principal

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[160] Helex 131.

[161] Tr. 13:1181.

use of gas has been and is, of course, for fuel. The second most important use of gas is as a feed stock for petrochemical operations.[162] The manufacture of carbon black, by the incomplete combustion of natural gas with oxygen, has long been a major use of natural gas. Until 1942, the greater part of the gas produced from the Panhandle field was used in carbon black manufacture and gasoline extraction, and not to serve pipeline consumer and industrial fuel markets. Natural gas is also used as a pressuring agent in oil production, in fire-flood, secondary recovery programs, as a purge for pipelines, and as a cushion gas in underground gas storage reservoirs.

Certainly, it was the common understanding among landowners in the area that the marketability of gas underlying one's property depended upon its being at least moderately combustible, sufficient to justify connection of the well to a pipeline, a town or city distribution system. On the other hand, no lessor ever limited the commercial end use of any gas produced under a lease granted by him, and there is no evidence that any lessor ever intended not to sell any and all gas produced thereunder for whatever market existed. In the only instance before a court where the marketability

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[162] Tr. 72:6850-6851; Tr. 52:5009. [Helex 103 shows the actual and theoretical chemical compounds which are or may be derived from the constituents of natural gas. Hydrocarbon compounds are separated by the process of fractionation, and are put to diverse end uses: e.g., normal butane is used as a propellant in aerosol containers, as a feed stock in the manufacture of synthetic rubber and acetate rayon; both nitrogen and hydrogen are used in the manufacture of ammonia; normal hexane is used as a solvent in food processing. Non-hydrocarbon components of natural gas are also widely used. Phillips, e.g., markets elementary sulphur extracted from hydrogen, sulphide, itself combustible though not a hydrocarbon compound. Mercaptans, hydrogen and sulphide compounds, are manufactured from hydrogen sulphide and marketed to stench or odorize natural gas and liquefied petroleum gas. Carbon dioxide is produced and marketed as a separate commodity from natural gas.]

of a gas depended upon its helium content and fitness for helium extraction, the lessor made no claim that helium did not pass under the lease. On the contrary, when the helium plant closed for want of a market for helium, and production from the well was stopped, the lessor claimed abandonment of the lease. (See the factual situation in *Hoff* v. *Girdler*, 104 Colo. 56, 88 P.2d 100 (1939), involving a well serving the Thatcher, Colorado helium plant operated by the Girdler Corporation, referred to earlier herein.)

At least six witnesses who had either taken leases themselves or supervised leasing activities testified that neither they, nor to their knowledge any other landman or lease negotiator, had ever discussed the gas stream sought to be leased in terms of its constituents. The only lease in evidence making specific provision for helium is a lease to the Shamrock Oil & Gas Corp., dated April 13, 1965,[163] long after the commencement of this litigation, where although the conventional granting language of "oil, gas and all other minerals" was unchanged, a special royalty provision for helium was inserted.

In our view, this argument is but an attempt to convert an uninformed popular notion respecting the commercial uses of natural gas into an intention by the lessor to convey only those discrete constituents of the gas stream, the uses of which conformed to that notion. In *Utilities Production Corp.* v. *Carter Oil Co.*, 72 F.2d 655 (10th Cir. 1934), the Court stated:

> "But the argument that the parties contemplated the use of gas only for such methods of operation and development as were known to the industry the day the leases were signed, is specious. It imputes to the parties an intention to encase themselves, during the terms of the leases, in a straight-jacket. The oil business, then and now, is one in which changes

[163] Shamrock Ex. 1, No. 103/4530.

> come with lightning-like rapidity. A review of the patent causes in the courts discloses the frequent and radical changes made in the methods of oil operations and development. The argument leads to the conclusion that residue gas could not be used even for drilling if the lessee used any improvement in drills or casing-shoes which was invented after the lease was made. Such a foreshortened intent cannot be imputed to the parties, for they knew that improvements would come about during the terms of the leases, and must have contemplated the use of such improved methods . . . ." 72 F.2d at 659.

We cannot import into a plain grant of "oil and gas" an intention on behalf of either the lessor to convey, or the lessee to receive, only those gaseous constituents of the stream the end uses of which conform to a subjective notion of the commercial end uses of the gas stream at the time of lease execution. This argument is without merit.

Landowners' fifth argument rests upon language found in granting clauses of nearly all the leases herein, which describe the lessee's rights upon the premises. Typically, this language provides that the lease is granted for the "sole and only purpose of mining and operating for oil and gas, and laying pipe lines, and building tanks, power stations and structures thereon to produce, save and take care of said *products* or *substances* . . . ." [Emphasis supplied.] Landowners argue simply that "[r]eference to things leased, including gas, as products or substances seems wholly incompatible with reference to a state of matter. [Landowners' Post-Trial Reply Brief, p. 19]. This reference is irrelevant, in our view, to construction or interpretation of the word "gas."

No case cited by landowners supports any of their arguments that gas conveyed by oil and gas leases is limited to gaseous hydrocarbons only.

Landowners rely in part upon a group of cases known as the Oklahoma "casinghead gas" cases. In *Hammett Oil Co.* v. *Gypsy Oil Co.*, 95 Okla. 235, 218 Pac. 501 (1921), plaintiff owned two-thirds of a 40 per cent interest in oil production which had been retained by an original lessee who had sub-leased part interest to defendant. Defendant contracted with the original lessors to manufacture gasoline from casinghead gas produced from oil wells. Plaintiff asserted that gasoline manufactured from casinghead gas from an oil well was oil, and entitled to royalty thereon. The court stated the familiar standard of interpretation:

> "In our judgment the question is not whether gasoline manufactured from casing head gas is oil in a technical sense, but whether it is oil in its ordinary and popular sense, and was so understood by the parties to the oil and gas lease. . . ." 218 Pac. 502.

The court found that oil, in its ordinary and popular sense as used in the lease referred to crude oil in its natural state as it was produced from the mouth of the well.[164] The court held that casinghead gas did not constitute oil upon which a royalty was payable.

A different result was reached in *Twin Hills Gasoline Co.* v. *Bradford Oil Corp.*, 264 F. 440 (E.D. Okla. 1919), wherein the lease provided separately for royalty on oil and a yearly payment of $200 on each gas-producing well. It provided further that the lessee would have the right to use casinghead gas from the wells of the lease for their operation. It appears that plaintiff sought $200 for each well from which casinghead gas was produced and sold, notwithstanding an oil royalty was being paid on

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[164] By necessary implication it does not mean a chemically pure mixture of liquid hydrocarbons.

production therefrom. The court held that casinghead gas was oil, reasoning thus:

> "In determining what the intent of the parties was, we look to the surroundings, the location, and the conditions of the oil business at that time. The evidence discloses that casing head gas is a component part of oil, that casing head gas is not made from dry gas, and that it is not a product of dry gas, but that it is a product of wet gas, and that wet gas exists only with oil. Therefore, casing head gas is a component of oil." 264 F. at 441.

In *George* v. *Curtain*, 108 Okla. 281, 236 Pac. 876 (1925), the court held specifically that casinghead gas was neither oil nor gas under an oil and gas lease which provided a royalty on oil from an oil well, and on gas from a gas well, but not for gas produced from an oil well:

> "[W]here the lease contract . . . was made prior to the time when casing-head gasoline was known to be of commercial value, and no mention made of the casing-head gas to be taken from the oil wells, we are forced to the conclusion that that subject was not within the contemplation of the parties when the lease contract was entered into, and is therefore not covered or controlled by said lease contract." 236 Pac. at 877.

The basis for this rule is stated in *Broswood Oil Co.* v. *Sand Springs Home*, 178 Okla. 550, 62 P.2d 1004 (1936):

> "Common usage of the terms 'oil' and 'natural gas' is the basic principle upon which the foregoing holding is based. A lease executed for the sole and only purpose of mining for oil and gas, reserving to the lessor a royalty on oil and on gas, means oil in its ordinary acceptation and *gas from a gas well as the same is ordinarily understood* . . . and in the absence of a contrary intention of the parties the courts will so construe the lease contract. Sections 9467, 9468, O.S. 1931." 62 P.2d at 1006. [Emphasis supplied.]

In *Navajo Tribe of Indians* v. *United States, supra,* the court suggested that the "Oklahoma courts were motivated by a desire to insure adequate compensation for the lessors." 364 F.2d at 326. It may equally be argued, however, that the Oklahoma courts regarded the provisions for royalty to indicate the common and ordinary meaning attributed to oil and gas by the parties, and that gas produced from an oil well did not fall within that manifest contemplation. In Oklahoma, the rules of construction are statutory.[165]

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[165] 15 Okl. St. Ann:

§ 152. A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful.

§ 154. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

§ 160. The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

§ 161. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.

§ 163. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.

§ 164. However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.

§ 170. In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party . . . .

In *Lone Star Gas Co.* v. *Stine,* 41 S.W. 2d 48 (Tex. Com. App.) (1931), 82 A.L.R. 1299, plaintiffs had executed certain gas deeds conveying to the defendant gas company all their "rights, title and interest . . . present and prospective, in all natural gas" in the described property, reserving to themselves all oil rights. The defendant later constructed an absorption plant to extract gasoline carried in the gas in the form of vapor. Plaintiff claimed that gasoline thus extracted was oil, not "natural gas", and therefore an one-eighth royalty was due. The right to helium was not an issue. The court stated:

> "The gas company paid a large consideration running into thousands of dollars for 'all natural gas' in and under these lands. An examination of the several instruments clearly discloses that the gas conveyed was not limited to any particular kind or character of gas, but the conveyance is all-embracing as regards gas, and covers and includes 'all natural gas.' The term 'all natural gas' would include all the substances that come from the well as gas, and that regardless of whether such gas be wet or dry. *It is undisputed in the evidence that the term 'natural gas' includes numerous elements or component parts, but the very language of the conveyance is such as to include therein all these component parts which were in gaseous form when they came from the wells.*
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> * * * * *
>
> This gasoline was separated from the gas and became liquid only when it was subjected to the manufacturing process shown above. It is true that the gasoline element was in the gas when it came from the well, but it was then in gaseous form, that is, it was an element or component part of the natural gas, and gas or natural gas was the thing conveyed by the deeds. The legal effect of the deed was to convey 'all natural gas,' and *by the term 'natural gas' is*

meant all the constituent elements composing the same.'' 82 A.L.R. at 1302-1303. [Emphasis supplied.][166]

Where language of a contract is doubtful or uncertain, a practical construction which the parties placed upon the contract over a long period of performance may be examined to arrive at the parties' intent and purpose. *Moore* v. *Jones,* 215 F.2d 719, 721 (10th Cir. 1954). All the landowners have done is to execute leases drawn by the lessee, and receive the fractional royalty by lessee on all gas produced, without qualifying or limiting the gas upon which such royalty is payable. Royalty clauses typically require payment of a fractional royalty, usually one-eighth, of the proceeds of the gas sold at the well, or if marketed off the lease premises, one-eighth of the market value of the gas at the wellhead. The nearly universal practice is to measure the volume of gas produced from the well by an orifice meter placed at or near the wellhead, which meter measures the entire volume of gas passed through the meter. The royalty is the product of a price stated per Mcf of gas multiplied by the number of Mcf passing through the meter. So, the pertinent conduct of the landowners is to have received payment for many years of a royalty based and computed on the total volume of gas produced, without objecting that the lessee was not entitled to all of the volume for which he tendered payment.

Likewise, lessee-producers have dealt with the total stream produced from the well, without regard to its separate constituents. They have produced it as a single

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[166] An operating agreement between the parties provided that plaintiff, having reserved the oil, could purchase any well producing oil only, and the gas grantee could purchase all gas wells. The court held the terms ''gas'' and ''natural gas'' to be synonymous.

stream, measured it thus and computed royalty payments on a volumetric basis.

Moreover, lessee's right to drill, produce and market gas under a lease is exclusive. A lessee "has the exclusive right to produce oil and gas from the premises for the time named in the lease . . . ." *Shaffer* v. *Kansas Farmers Union Royalty Co.*, 146 Kan. 84 at 89, 69 P.2d 4 (1937). It is a grant of the "exclusive right . . . to take all the oil and gas that could be found by drilling wells upon the particular tract." *Rich* v. *Donaghey*, 71 Okl. 204, 177 P. 86, 89 (1918), and see *In re Levy*, 185 Okla. 477, 94 P.2d 537, 538 (1939). In Texas, an oil and gas lease grants the lessee exclusive rights to all oil and gas therein. See *Howell* v. *Comm'r of Internal Revenue*, 140 F.2d 765 (5th Cir. 1944), *certiorari den.*, 322 U.S. 735, 88 L.Ed. 1569, 64 S.Ct. 1048.

The conduct of the parties bears upon another issue, however, insofar as it may be relied upon by any adverse claimant to the funds in issue as a basis for estoppel against the landowners who seek to press their own claims.

In 28 Am. Jur. 2d, *Estoppel and Waiver*, § 27, the writer offers the following encylcopedic definition of estoppel:

> "The most comprehensive definition of equitable estoppel or estoppel in pais is that it is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion was allowed."

In *Gas Service Co.* v. *Consolidated Gas Utilities Corp.*, 145 Kan. 423, 65 P.2d 584 (1937), the court approved the words of another encyclopedist:

> "The rule as to what should constitute equitable estoppel is very well stated in 10 R.C.L., page 689. There it is said:
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> " 'So, while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. . . . The following, however, may be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all of the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice.' " 145 Kan. at 435-436.

Landowners are not estopped to claim the fund as against the adverse stakeholders, for, to paraphrase *Gas Service Co., supra*, "there can be no claim that the conduct of [plaintiffs] was influenced by any conduct or concealment or positive action on the part of . . . [defendant landowners]." 145 Kan. at 436. For the identical reason, the landowners here are not estopped in their claims to the fund as against their fellow claimants, the lessee-producers, for no conduct of the landowners has in any way prejudiced or otherwise affected the claims of the latter to the fund.

In view of the circumstances existing at the time of the lease executions, the definition and usage of terms within the industry, and by the intention of the parties as disclosed by their actions, the court concludes that the grant of gas in each of the leases herein extends to the

entire gas stream which emerges at the wellhead absent an express reservation of any constituent products, and that helium passes thereunder unless expressly reserved.

Gas Purchase Contracts

The next question is whether title to helium passed not only from the landowners to the lessee-producers but from the lessee-producers to their pipeline company purchasers. This question rests upon the gas purchase contracts under which the lessee-producers sell and deliver natural gas to the pipeline purchasers.

Insofar as pertinent herein, the typical contract contains a recital clause, a definition of gas, a dedication or commitment of described acreage, reservations therefrom and processing rights, if any, statements of the quantities to be produced and delivered, pricing provisions, Btu rejection and/or price adjustment clauses, quality standards, provisions for standards and methods of measurement, billing and payment procedures, and warranties of title.

Recital clauses, when they occur, frequently express with varying brevity or elaborateness the interest of the buyer, as owner of a natural gas pipeline system, in acquiring additional supplies of gas therefor.[167]

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[167] See, e.g., contract dated March 12, 1948, between United Producing Co. and Cities Service Gas Co.:

> "Cities is engaged in the business, among other things, of producing and purchasing natural gas and selling same as wholesale to distributors of natural gas in numerous towns and communities in a wide area comprising several states of different climatic and temperature characteristics. In order to meet the requirements of its said customers, it is desirous of obtaining, from time to time, supplies of merchantable natural gas, in addition to its present supply, that will be ample to meet, insofar as is possible, at all times and over a long period of years, the demands of its customers at the various times such demands occur in its widely distributed markets." Ashland FPC Rate Schedule 111, Ashland Ex. 5; Tr. 37:3740.

Definitions of gas are expressly comprehensive, and refer typically, for example, to "all gas produced from gas wells including all gases indigenous to the reservoir . . . ;" or "the entire stream flowing from a well including all compounds, elements, and mixtures indigenous to the reservoir . . . ;" or "raw natural gas indigenous to the reservoir" or "raw natural gas, without removal of any of its constituents."[168] Gas and natural gas are used interchangeably throughout these contracts with the same meaning.

Dedication or commitment clauses describe the acreage or wells from which gas is committed to performance of the contract. Every commitment clause contained in a Panhandle contract with a named lessee-producer specifically dedicates *all* gas which is produced, or which can be commercially produced, or in which seller has an interest.[169] Leases under which production is committed are generally identified in the contracts by legal description of the acreage, name of lessors, dates of leases, and the name and percentage interest of the seller. These dedication or commitment clauses made no distinction as to the composition of gas from the committed acreage.

From gas from the committed acreage, there may be reserved to the seller oil, casinghead gas, gas used in lease operations, liquid hydrocarbons, oil or condensate removed by separators, and liquefiable hydrocarbons, all removed according to specific processing rights elsewhere in the contract. It is the practice in the industry that no seller of gas retains rights to process the stream for removal of any of its constituent parts, such as gasoline, or liquid or liquefiable hydrocarbons unless the right is specifically reserved to him in the contract. Six Panhandle contracts, all executed since 1963, reserve to the seller the right to process the gas stream for the ex-

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[168] Helex Ex. 85, part 1.

[169] Helex Ex. 84.

traction of helium, but that if he fails to do so, or to commence extraction within a given period of time, its rights under that reservation terminate.[170]

Statements of quantity to be produced are typically stated in terms of volume. Production from pro-rated wells, of course, is determined by the production allowances assigned by state regulatory bodies. For non-prorated wells, annual production is frequently stated by the contract to be at an annual rate which will cause depletion of the well within a period of years, commonly twenty; non-prorated production may also be stated to be in volumes ratable with all other wells connected to the buyer's system producing from a common source of supply.[171]

The price is universally stated in cents per thousand cubic feet (Mcf), and the unit of measurement is typically stated as "1000 cubic feet (Mcf) of gas at a temperature of sixty degrees (60°) Farenheit and an absolute pressure of fourteen and sixty-five hundredths pounds per square inch (14.65 psia)."[172]

Nearly all contracts held by interpleading plaintiff pipeline companies with named lessee-producers contain what are referred to herein as "Btu clauses."[173] Btu is the abbreviation for British Thermal Unit, the amount of heat required to raise one pound of water one degree Fahrenheit at 39.2° Fahrenheit. Btu clauses are of three basic kinds. Nearly all contracts contain Btu rejection clauses, which permit the buyer to refuse gas which yields less

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[170] Helex Exs. 84, 85.

[171] Helex Ex. 84.

[172] Ibid.

[173] LPX 220.

than a specified number of Btu's per cubic foot of gas.[174] The second type, the downward Btu price adjustment clause, or penalty clause, permits the buyer to reduce the price payable in proportion that the Btu yield falls below a specific level per Mcf. Rejection and penalty clauses are typically combined, with the penalty invoked at a level somewhat higher than the rejection level. Penalty clauses may require the price reduction to be computed by either a proportionate, calculated reduction in the volumes upon which the contract price is payable[175] or by proportionate reduction in the price itself.[176] A limited

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[174] "4.2. Minimum. The gas delivered hereunder shall have a heating value of not less than 1,000 BTU per cubic foot. If the heating value of any gas tendered hereunder shall be below 1,000 BTU per cubic foot, Buyer may, at its option, refuse to accept delivery of such gas, in which event the producing horizon from which the substandard gas is being produced . . . shall be released from the terms and conditions of this Agreement." Gas purchase agreement between Pan American Petroleum Corp. and Panhandle Eastern Pipe Line Co., March 5, 1958, Gulf FPC Rate Schedule 167, Gulf Ex. 18.

[175] "If in any month, the average total *heating value*, when saturated with water vapor, of the gas delivered hereunder shall have been less than 1,000 B.T.U. per cubic foot of gas, then the volume of gas measured hereunder during each month shall be reduced by multiplying the volume delivered by the quotient obtained by dividing the average heating value of the gas delivered in B.T.U. per cubic foot by 1,000." Gas purchase contract between United Producing Company, Inc., and Argus Natural Gas Company, August 25, 1943, Ashland FPC Rate Schedule 116, Ashland Exh. 7.

[176] "(b) *Adjustment for Deficiency.* If the weighted average gross heating value of all gas delivered hereunder during any month shall be less than 950 Btu per cubic foot when saturated with water vapor, then the applicable price . . . . which would otherwise be payable for all gas delivered hereunder during such month shall be reduced by multiplying said price by the quotient obtained by dividing the weighted average gross heating value of the gas so delivered, expressed in Btu per cubic foot when saturated with water vapor, by 950; provided, however, such adjusted price shall never be less than 9.8262 cents per one thousand cubic feet (MCF)." Contract between United Producing Co. and Northern, now Ashland FPC Rate Schedule No. 122, Ashland Ex. 10.

number of contracts contain *upward* Btu price adjustment clauses, whereby the price is proportionately increased for gas containing over a given number of Btu's.[177]

Btu clauses are commonly placed in the "Quality" sections of the contracts, which also typically state maximum levels for so-called impurities, such as hydrogen sulphide, sulfur, carbon dioxide, uncombined oxygen, and require that the gas delivered be merchantable, or as produced in its natural state, and that it be practically free of foreign materials and objectionable substances, such as water, crude oil, dust and the like.

Billing is generally provided to be by monthly statements showing the amount in volumes of gas delivered during the preceding month.

We find no contract in which the seller does not warrant title to the gas delivered to the buyer. Such warranties typically extend to all *gas* delivered.

Since 1960, a few Panhandle gas purchase contracts provide expressly for the reservation of helium to the seller

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[177] See contract executed April 6, 1960, between United Producing Co. and Panhandle Eastern, now Ashland FPC Rate Schedule No. 142, Ashland Ex. 14:

> "(c) *Adjustment of Price:* If the heating value of the gas delivered to Buyer at any delivery point shall be less than 1,000 Btu per cubic foot, then the price payable for such gas delivered at such delivery point shall be proportionately reduced, and, if the heating value of such gas is greater than 1,000 Btu per cubic foot, then the price for such gas shall be proportionately increased. To determine such increased or reduced price, the applicable price . . . shall be multiplied by a factor, the denominator of which shall be 1,000 and the numerator of which shall be the heating value of the gas delivered at such delivery point; provided, however, notwithstanding anything herein to the contrary, the factor used in determining such increased price shall not in any event exceed 1.2 even though the heating value of the gas is found to be in excess of 1,200 Btu per cubic foot."

in accordance with specified processing rights. One form of reservation permits the producer to remove helium prior to delivery to seller at points at or near the wellhead; as to all helium not so removed, the seller warrants title.[178] Another provision permits the seller to elect within the first two contract years to extract liquefiable hydrocarbons and/or helium, and requires commencement of extraction within three years. Failing this, such rights terminate.[179] A third variation provides that upon failure to commence extraction within three years, seller expressly releases all claims to helium contained in gas delivered under the contract.[180]

Lessee-producers' contentions are basically threefold: that natural gas, or gas, as used in those contracts, is used with a trade or industry meaning to describe gaseous hydrocarbons alone; that by operation of Btu price adjustment clauses payment under those contracts is geared to the hydrocarbon content alone, and helium, although delivered in the gas stream, is not paid for; and lastly, that construction of the contracts to cover helium would be repugnant to both Section 11 of the 1960 Helium Act Amendments, and the Natural Gas Act.

We turn first to the alleged industry meaning of the terms "gas" and "natural gas" to define "a mixture of gaseous hydrocarbons, formed in nature and found in the earth." A number of witnesses with long experience in the industry testified to such a usage.[181] A number of definitions of gas and natural gas from mining, petroleum engineering, and geology glossaries and dictionaries, the publication dates of which span the period from 1914 to

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[178] See, e.g., Ashland Exh. 17, p. 17.

[179] Ashland Exh. 14, p. 29.

[180] E.g., Cities Service Oil Exh. 6, FPC Rate Schedule 138, p. 24 of contract dated March 24, 1960.

[181] Tr. 37:3731, 3737; 43:4275-4290; 44:4297-4299.

1965, were introduced into evidence.[182] In the earliest publication, a United States Geological Survey glossary published in 1914, natural gas is defined as a "mixture of gaseous hydrocarbons found in nature; in many places connected with deposits of petroleum, to which the gaseous compounds are closely related,"[183] a definition which appears frequently thereafter. A petroleum refining glossary published in 1953 by the American Petroleum Institute defines natural gas as "[g]aseous forms of petroleum, commonly called 'natural gas,' [which] consist of mixtures of hydrocarbon gases and vapors, the more important of which are methane, ethane, propane, butane, pentane, and hexane, all of the paraffin series . . . ."[184]

Another of the dictionaries offered by lessee-producers was cited in *Deep South Oil Co. of Texas* v. *F.P.C.*, 247 F.2d 882, (5 Cir., 1957); Cert. Den., *Humble Oil & Refining Co.* v. *F.P.C.*, 355 U.S. 930, 2 L.Ed.2d 413, 78 S.Ct. 410.

> "Petitioner also insists that the casinghead gas which it sells is not 'natural gas' within the meaning of the Act. For answer we deem it sufficient to say that there is nothing in the general language used in the definition of 'natural gas,' quoted above, which suggest that a special or narrow or unnatural definition was meant. Boone's Petroleum Dictionary (1952) defines natural gas as *a mixture of gaseous hydrocarbons found in nature.*" 247 F.2d at 888.

The Boone definition is identical with the 1914 U.S.G.S. definition. The Natural Gas Act, 15 U.S.C. § 717 et seq., is of little assistance. It defines natural gas simply as "either natural gas unmixed, or any mixture of natural and artificial gas." 15 U.S.C. § 717(a).

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[182] LPX 241, 242.

[183] Ibid.

[184] Ibid.

The helex parties counter with their own definition of "Natural gas of commerce . . . [as] a hydrocarbon mixture generally containing other gaseous substances, some of which are inflammable, some non-inflammable, and others corrosive in their natural and combustion states."[185] The helex group likewise responded with witnesses also of long familiarity with the petroleum producing and transporting industry, who had never heard of the lessee-producers' alleged industry usage.[186]

In dealing with similar claims regarding the leases, we found that no such usage existed. For the same reasons, we must reiterate that finding here. The term "natural gas" came into existence, it was testified, to distinguish or differentiate fuel gas discovered in underground reservoirs from artificial or manufactured gas, the former having approximately twice the heating value and efficiency of the latter. As we stated before, there is no gas naturally occurring in the entire Hugoton area which consists solely of hydrocarbons, and hence, which would conform to the alleged usage.

The Btu clauses provide the core of the lessee-producers' second argument that only heat-producing hydrocarbons are conveyed under their gas purchase contracts. They

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[185] Helex Ex. 275. See also a joint publication of the American Gas Assoc., American Petroleum Institute and the Canadian Petroleum Association concerning reserves of natural gas in the United States and Canada, dated December, 1966, which states as follows:

> "For the purpose of the committee report, natural gas is defined to be a mixture of hydrocarbon compounds and small quantities of various non-hydrocarbons existing in gaseous phase or in solution with oil in natural underground reservoirs at original reservoir conditions. The principal hydrocarbons usually contained in the mixture are methane, ethane, propane, butanes and pentanes and typical non-hydrocarbon gases which may be contained in reservoir natural gas are carbon dioxide, hydrogen sulphide, nitrogen . . . ." LPX 239.

[186] Tr. 48:4580; 56:5327.

characterize these clauses as the "tool . . . developed by the pipeline companies and by the industry as a whole to accommodate the needs and desires of the pipelines for merchantable gas and to pay only for the hydrocarbons which they received from the producers."[187] In sum, it is argued that pipeline companies purchase not natural gas, but energy, that the energy of natural gas derives solely from the gaseous hydrocarbons, and that Btu clauses are the means provided to conform payments to the energy content of the gas delivered.

Pipeline companies respond that they buy and pay for volumes of gas as produced from the well, without regard to its constituents. They point out the limited operation of Btu price adjustments in purchases by each of the plaintiff pipeline companies. For example, of Northern's total 1966 purchases of 195 billion cubic feet of gas, 12 billion, or 6.4%, was subject to Btu penalties for low Btu yield. Of purchases from the Kansas Hugoton, 7.2% was adjusted and in the Guymon Hugoton field, one per cent. Of Cities' total gas purchases in the Hugoton area, Btu penalties were invoked on less than six per cent, and this adjustment, it was testified, was limited to gas purchased from Pan American, which is produced from the so-called "C" acreage in the Kansas Hugoton.[188]

Pipeline companies dispute the argument that inert constituents of the stream are valueless. Indeed, they assert that the inerts are necessary for them to comply with their FPC gas tariffs. The Panhandle tariff provides the following limitation on Btu content:

> "2.2 Heating Value. Gas delivered by Seller shall not have a total heating value above one thousand fifty (1050) or below nine hundred fifty (950) British thermal units per cubic foot."[189]

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[187] Tr. 43:4256.

[188] Tr. 52:4959-4960.

[189] LPX 195; Helex 101; second revised sheet No. 34.

The Cities tariff provides thus:

> "2. QUALITY
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> The natural gas supplied hereunder shall be of a merchantable quality and shall have a system wide weighted average total heat content of not less than nine hundred thirty-four (934) British Thermal Units per cubic foot saturated with water vapor under the standard measurement next recited. The Company will, however, endeavor to maintain as nearly as possible a system wide weighted average total heat content of nine hundred eighty-three (983) British Thermal Units per cubic foot . . . ." [190]

The Northern tariff provides as follows:

> "2.2 Heating Value. The heating value of the natural gas received by Northern from its sources of supply may vary, but it is expected that the gross heating value of the gas delivered will not be less than 975 nor more than 1025 Btu per cubic foot. However, if in any month the arithmetic average of heating values recorded hourly by Northern's calorimeter shall be less than 975 Btu per cubic foot, then the volume of gas delivered during such month shall be computed by multiplying the volume computed as provided [herein] . . . by a fraction whose numerator shall be such arithmetic average heating value and whose denominator shall be 975.X" LPX 191, Orig. Sheet No. 128.[191]

The upper limit is partially, at least, a safety precaution. Delivery of a richer gas than the burner is set for may result in incomplete combustion, smoke, soot, and toxic gases. Any gas in the Hugoton area would yield over

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[190] LPX 193, Orig. Sheet No. 25.

[191] LPX 191, Orig. Sheet No. 128.

1,050 Btu's (per cubic foot) if all inerts were removed.[192] Thus, the inert constituents of the stream, including helium, are necessary to enable it to comply with its tariffs and to market natural gas thereunder.

Further, the pipelines point out that so long as gas is above the tariff Btu minimum, they realize greater gross revenue from delivery of a lower rather than a higher Btu gas, for the buyer must then purchase a greater volume of gas to obtain the same heat yield. They further point out that the heating value of a gas stream is not directly a function of the inerts contained therein. Thus, of three samples of gas each containing 17.5% inerts by volume, Btu content ranged from 942 to 1005.[193]

Pipelines further point out that both the producing and transportation industries have dealt with gas in its gross volumetric dimensions in numerous ways. Thus, measurement of gas at the point of delivery to pipeline purchasers, whether at the wellhead or elsewhere; reporting of open flow potentials (the gas well can produce against atmospheric pressure); the setting of allowable production amounts by state regulatory bodies; computation of industry taxes, such as gross production, conservation and sanitation; measurement of tailgate deliveries at processing plants; estimation of reserves; and measurement of pipeline deliveries to distributing companies—all are done on a volumetric basis.

Lessee-producers find support for their appraisal of the importance of Btu clauses in two proceedings before the Federal Power Commission. In the first, the Commission dealt with the necessity and propriety of *upward* Btu adjustment clauses. Although penalty clauses appear in gas purchase contracts commencing around 1943, and were approved by the FPC when it assumed jurisdiction over

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[192] Tr. 41:4088.

[193] Helex Ex. 279.

independent producers in 1954, it had not approved upward Btu clauses, which provide premium prices for high Btu gas. In this proceeding, the Commission specifically approved upward adjustment clauses, notwithstanding the fact that their operation would increase the cost of such higher Btu gas above the guideline levels which had theretofore been established. The decision to approve such clauses was grounded not upon any effort to correlate prices to energy content as the subject of the sale, but to provide an economic incentive to producers with high Btu gas to introduce such gas into the pipeline market, without first removing the higher hydrocarbons therefrom.[194] The Commission stated thus:

> "It is no coincidence that, while downward Btu provisions, usually from a 1,000 Btu base, are found generally in all producing areas, the upwards Btu clause has been limited almost entirely to the five pricing areas involved in the instant certificate proceedings. In these or nearby areas considerable amounts of low Btu gas, ranging as low as 830 Btu per cubic foot, have been discovered and made available for the interstate market. It is essential, if this gas is to be brought up to marketable standards, that it be mixed with higher Btu gas—gas which also is present in considerable quantities in the areas, with Btu ranges of up to approximately 1,200 Btu's. It is clear, however, that unless the pipeline is in a position to offer a reasonable premium for the higher Btu gas, the producers will have a strong economic interest to extract the high Btu hydrocarbons from their gas before delivery to the pipeline. . . . Under these circumstances, an appropriate upward Btu adjustment provides the necessary inducement for producers making it possible for the pipe-

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[194] See Opinion No. 464, *Texaco, Inc., et al.*, Dkt. No. G-8087 (LPX 218).

lines to acquire the supply of high Btu gas required for blending without which a large supply of low Btu gas could not be brought into the interstate pipeline system. Accordingly, we hold that the upward clauses here in issue are reasonably required by the public convenience and necessity for these areas."

The second proceeding was the Permian Basin area rate proceeding, recently affirmed in toto in *Permian Basin Area Rate Cases*, 390 U.S. 747, 20 L.Ed.2d 312, 88 S.Ct. 1344 (1968). In its opinion[195] the Commission approved price adjustments based on Btu content, fixing an upward Btu adjustment from a base of 1,050 Btu's, and a downward adjustment, or penalty, from 1,000 Btu's. Thus, gas with a Btu content of less than 1,000 Btu per cubic foot must be sold at a price proportionately lower than the applicable area maximum, and gas with a Btu content of more than 1,050 Btu per cubic foot may be sold at a price proportionately higher than the area maximum. Within the 50 Btu range, no adjustment is made. The following language from the Commission's opinion is pertinent:

"The importance of quality standards as an integral part of our ceiling price becomes readily apparent if it is recognized that gas is purchased for its energy. The price of gas cannot be related to volume alone but must be related to units of energy free of impurities and sufficiently compressed to enter the pipeline if it is to serve as a mechanism to assure just and reasonable rates."[196]

"Looking to the future, however, we believe that it is important that we implement the general prin-

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[195] Excerpted in LPX 219.

[196] LPX 219, p. 95.

ciple that Btu adjustment provisions 'are in the public interest' advanced in our recent decision in Texaco, Inc., Opinion No. 464 (decided June 10, 1965). While Btu adjustments have not played a major role in the Permian Basin in the past we believe it important that our price for new gas-well gas reflect the energy content of the gas, which in reality is what the consumer is purchasing." [197]

Natural gas is sometimes sold on an energy basis, that is, at a given price per 100,000 Btu's (a therm), and not per Mcf. When gas is purchased on this basis, the contract says so. Such sales are not common. Northern has two contracts in the State of Kansas for direct sales of gas (not for resale) on the therm basis. Northern sells gas under two additional contracts containing Btu adjustment clauses above and below 1,000 Btu. These sales comprise only two percent of Northern's total sales. All other sales are made on a volumetric basis subject to the tariff Btu minimum of 975.

Cities likewise has two contracts, both with one customer, in which gas is sold at a given price per million Btu's. A number of early gas sales contracts between Panhandle and various companies, frequently distributing companies, provided for the sale of gas in both volumes and Btu equivalents.[198] Panhandle's original tariff filed with

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[197] LPX 219, p. 99.

[198] See, e.g., a contract dated August 31, 1935, between Panhandle and Detroit City Gas Company, at page 3:

"• • • seller agrees to sell and deliver to buyer, and buyer agrees to buy from seller, all of the natural gas requirements of buyer for the distribution and sale to any and all of its present and future customers and for its own use but not in excess of 90 million cubic feet, or its equivalent 912,000 therms per day, which represents all of the gas seller now believes it can safely contract to furnish buyer at this time." Helex 99, part 3.

the FPC provided that the unit of gas delivered thereunder would be the therm.[199] The current tariff provides that the "sales unit of the gas deliverable by Seller to Buyer shall be one thousand cubic feet (MCF) . . . ."[200] Thermal content is now but a specification of quality.

Sales, however, are still made on a therm basis by some companies.[201]

When gas is sold on a therm basis, the argument is plausible that the buyer purchases only energy. In the purchase of natural gas for resale in interstate commerce, under contracts such as those before us, we cannot but conclude, however, that pipelines purchase not energy, but fuel, which is measured and purchased on a volumetric basis. We cannot so override the plain language of contracts providing for the purchase of *gas* so as to find that the parties were dealing in energy, or British thermal units, alone.

Thirdly, lessee-producers argue that even if the gas purchase contracts be construed to convey the entire stream, the price paid thereunder cannot, as a matter of law, have

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[199] Helex 100, part 2.

[200] LPX 195, Orig. Sheet No. 35.

[201] One witness testified before the FPC in the Texaco, Inc., proceeding concerning Btu price adjustment clauses, as to the prevalence of the practice:

"Question: Have you found tariffs which are not on a volumetric basis?

"Answer: Yes. In the past, many of the pipeline companies sold the gas at the city gate on a therm basis but most of the companies have now changed to an M.c.f. sale basis with specific heating value specifications.

"Natural Gas Pipe Line Company currently delivers gas on a therm basis to its distributing company customers. Moreover, a number of distributors sell to their customers on a therm basis or M.c.f. with b.t.u. adjustment basis." [Tr. 49:4722].

included payment for helium. The parties have stipulated that helium-bearing natural gas delivered to Cities Service Gas, Northern Natural Gas, and Panhandle from which helium is subsequently extracted is gas purchased for resale in interstate commerce, that all natural gas purchase contracts and amendments thereto between lessee-producers and Cities Service Gas, Northern Natural Gas, and Panhandle are filed with the Federal Power Commission as part of FPC Rate Schedules under the Natural Gas Act, as amended, 15 U.S.C. § 717, et seq., and that all payments made by these three pipeline companies to lessee-producers are at rates established or permitted to be paid by the Federal Power Commission.[202]

Since June 7, 1954, these sales by lessee-producers to pipelines have been regulated by the Federal Power Commission under the Natural Gas Act, under *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S. Ct. 794 (1954), wherein the Court held that the Commission's jurisdiction extended "over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company" 347 U.S. at 682, 98 L. Ed. at 1047-48. Later that year, following that decision, the Commission ordered that all independent producers so engaged on or since June 7, 1954, file with the Commission rate schedules consisting of the "basic contract and all supplements or agreements amendatory thereof . . . showing the service to be provided and the rates and charges . . . applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission."[203] An independent producer is defined as "any person as defined in the Natural Gas Act who is engaged in the production

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[202] Pre-Trial Order, p. 12 ¶¶ C, D, E.

[203] 18 CFR § 154.93.

or gathering of natural gas and who sells natural gas in interstate commerce for resale, but who is not engaged in the transportation of natural gas (other than gathering) by pipeline in interstate commerce." [204]

No sale may be made by a producer of natural gas in interstate commerce for resale unless there is on file with the Commission a certificate of public convenience and necessity authorizing the sale, and a rate schedule covering that sale, and no payment may be received except at the effective rate on file.

From 1954 through 1960, the Commission attempted rate regulation of independent producers on the basis of conventional company-by-company, sale-by-sale, utility regulation.[205] In 1960, the Commission abandoned this method, and undertook rate regulation on a geographical area basis, dividing the country into 23 pricing areas, and assigning to each preliminary prices called "guideline prices," pending final determination of just and reasonable rates for each of these areas. The prices thus set constituted maximum prices for each area.

These guidelines were applied to rates in the following manner. If a rate increase was filed by the parties to a gas purchase contract which did not increase the rate above the area guideline, the new rate would be approved automatically. If the new filed rate was higher than the guideline, the increase would be suspended and an investigation commenced. Thus, the contract price in some instances may exceed the FPC-approved service rate, where the contract price exceeds the guideline prices and has been suspended pending investigation.

The Commission is also charged with rate regulation of pipeline companies, which is based on conventional public utility regulation, the basic principle being "to prescribe

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[204] 18 CFR § 154.91(a).

[205] Tr. 73:6937.

rates which will give the company the opportunity to generate revenues sufficient, after meeting all reasonable operating expenses, depreciation and taxes, to yield to the company profits . . . roughly comparable to those of companies engaged in comparable risks."[205] The sum of these expenses, depreciation, taxes, and return on investment, constitute a company's cost of service, after recovery of which the company earns a profit. A pipeline may engage in what are described as non-jurisdictional activities, such as the extraction of hydrocarbons, which the Commission is not empowered to regulate. Thus, the sales of the products of such extraction are not subject to Commission rate regulation. However, the earnings realized from such non-jurisdictional activities are credited to the jurisdictional income of the company, or against its cost of service, in computing the profits realized by the company. Inasmuch as the earnings from the sale of hydrocarbons are proportionately greater than the earnings from the sale of natural gas, the earnings from non-jurisdictional hydrocarbon extraction operate to reduce the rates it will be permitted to charge for jurisdictional sales of natural gas. Stated otherwise, profits from hydrocarbon extraction are credited to the profits realized from natural gas sales, and permit a reduction in gas rates, with the end result that the returns to the pipeline from non-jurisdictional activities are reduced to the average earned on the whole of its system.

In drafting the Helium Act Amendments of 1960, it was thought that absent express provision, revenues from helium activities accruing to any pipeline company or other company subject to the rate making jurisdiction of the Federal Power Commission would be similarly treated, and it was anticipated that industry participation would be more difficult to promote if participating companies could anticipate only a public utility rate of return on its investment. Accordingly, to provide an economic incen-

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[205] Tr. 73:6912-13.

tive to industry to undertake helium conservation, the Department of the Interior proposed to exempt helium extraction operations from the provisions of the Natural Gas Act and the jurisdiction of the Federal Power Commission.

Section 11 of the 1960 Amendments provided accordingly:

> "The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 717c and 717d of Title 15, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis." 50 U.S.C.A. § 167(i).

During committee hearings on this section, FPC representatives objected that it jeopardized Commission jurisdiction over any stream of natural gas containing helium. It was made clear in both the hearings and floor debate that FPC jurisdiction over natural gas containing helium was to be unaffected by the amendment.[207]

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[207] This section was not in the proposals first submitted to Congress in 1958. It appeared first in the redrafted proposals submitted in 1959, in the following form:

> "SEC. 9. The provisions of the Natural Gas Act . . . shall not be applicable to the sale, extraction, processing, trans-

No party here seriously contends that Section 11 strips the Commission of all its power to determine the rates at which helium bearing natural gas may be sold by lessee-producers to pipeline purchasers, or the rates at which pipeline companies may sell this gas for resale. There has been no change in the methods of Commission regulation of independent producers as a result of the Helium Act Amendments.

The question is whether or not although lessee-producers have contracted for the sale of the entire gas stream, they have received any payment for the helium constituent thereof since 1960. This question is premised on the

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portation or storage of helium, either prior to or subsequent to *its separation* from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and, in the determination of rates under Sections 4 and 5 of the Natural Gas Act as amended, the income received from such helium shall not be considered and no exploration, production, gathering, extraction, processing, compression, transportation, storage or other costs which were or would have been incurred in the absence of the extraction of the helium shall be allocated or assigned to the helium." [Italics supplied.]

In response to the FPC fears for its jurisdiction over the entire gas stream notwithstanding helium contained therein, the language italicized was deleted, and the language "the separation of such helium" inserted. During debate on the Senate floor, Senator Carroll stated thus:

> "I wish the RECORD to be crystal clear, so that any court which reads this RECORD will know what is the specific legislative intent, namely, that we are not exempting helium-bearing gas from jurisdiction by the Federal Power Commission under the Natural Gas Act. There can be no question about that. For anyone who reads the hearings of the Senate Committee, the report of our committee, my own individual views, which are a part of the Interior Committee reports, and, I hope, the debate this evening."

106 Cong. Rec. 18603 [Helex 281, part 9.]

contention that the Helium Act Amendments of 1960 oust the FPC of rate-making jurisdiction as to all sales of helium, ". . . either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, . . ." [208]

The section was manifestly intended to give any company which is otherwise regulated by the Federal Power Commission complete freedom from Commission regulation in any transaction for the sale, processing, transportation of helium, either commingled with the stream or separate therefrom.

Section 15, 50 U.S.C. § 167m, of the Amendments, provides:

> "It is the sense of the Congress that it is in the national interest to foster and encourage individual enterprise in the development and distribution of supplies of helium, and at the same time provide, within economic limits, through the administration of this chapter, a sustained supply of helium which, together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Government activities."

The pipeline companies argue that Section 11, making the Natural Gas Act inapplicable to the "sale, extraction . . . of helium either prior to or subsequent to the separation of *such* helium," applies only to transactions respecting the sale of helium as a separate commodity, and not merely as a component of an entire gas stream. Stated otherwise, it is argued that Section 11 applies only to such helium as is specifically and/or separately the subject of a sale.

"The regulatory system created by the [Natural Gas] Act is premised on contractual agreements voluntarily de-

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[208] *Ibid,* Sec. 9 became Sec. 11. See 50 U.S.C. § 167.

vised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." *Permian Basin Area Rate Case,* 390 U.S. 747, 20 L. Ed. 2d 312, 367, 88 S. Ct. 1344 (1968). We have held that lessee-producers contracted to sell, and pipeline companies contracted to purchase, the entire gas stream with all its components, except those expressly reserved.

We think it cannot be disputed that one purpose of Section 11 was to permit parties otherwise subject to FPC regulation to contract for the sale of helium whether commingled with the natural gas stream or not, without FPC regulation. That right is not in issue here, as the pipeline companies point out. The only question is whether the section entitled vendors of helium-bearing natural gas to recover from their purchasers a sum for helium sold under their respective rate schedules above that contractually agreed upon by the parties prior to 1960 as the price of the entire stream.

The argument for lessee-producers is appealing. The Helium Act Amendments created a market for helium which did not theretofore exist. The United States became a major potential purchaser of helium, to supply a newly created demand for helium to meet not only current, but future needs. Prior to 1960, pipeline companies had realized nothing out of helium. For many years it had been a useful, scarce and wasting natural resource. It was not one of economic importance to the pipeline companies, however, who regarded it as a valueless diluent of the heating value of the stream until a market was created. The passage of the Act created a market for helium, and caused it to become a national resource of major economic importance, solely by virtue of the United States' interest in conserving and purchasing it. Certainly, one effect of Section 11 is to permit contracting parties to recognize its newly acquired economic importance in future contracts for its sale, without regard to FPC regulation of natural

gas prices. We do not think that Section 11 was intended to relieve all lessee-producers selling helium-bearing gas from contracts which they might regard as unfair, simply because of a subsequently created market for a constituent of the gas stream which they sell. We must conclude that Section 11 of the Helium Act Amendments does not alter the scope of the gas purchase contracts, does not strip the helium from the gas stream for which the stated price is being paid, and does not *require* that persons contracting for the sale of gas contract separately for the sale of the helium constituent. It merely permits them to do so, and when they have not, the contract must stand as it is written.

F.P.C. Primary Jurisdiction

A question remains with respect to the alleged primary jurisdiction of the Federal Power Commission over the matter involved here. Both Northern and Cities moved to stay proceedings in their respective cases herein, pending determination of certain issues by the F.P.C.[209] Northern proposed that the court refer two issues for Commission determination; that is, whether the lessee-producers' rates on file with the Commission apply to the entire gas stream sold and delivered under lessee-producers' sales contracts, and whether landowners' royalties must be computed only upon those filed rates.

The Cities' issue, already pending before the Commission in designated proceedings, was "whether . . . landowners and producers . . . can lawfully collect more for the gas produced from their well and sold in interstate commerce than that permitted under the defendant producers' F.P.C. Gas Rate Schedules."[210]

The court overruled these motions on the grounds that the issues in the pending F.P.C. proceedings were neither

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[209] Dkt. Nos. 1209, 1211, KC-1969.

[210] Dkt. 1211, KC-1969.

the same nor germane to those herein; that no determination of the issues in those cases would materially assist in the instant cases; and that under Section 11 of the 1960 Helium Act Amendments no issue respecting helium *could* lie within the jurisdiction of the F.P.C.[211]

The court has previously ruled, p.p. 30-32, supra, that there is no jurisdiction of landowners' cross-claims for royalty payments from lessee-producers because such claims do not affect their right to participate in the interpleaded fund. Both Cities and Northern have persisted in the view that because helium is in the gas stream, that the Natural Gas Act gives them primary jurisdiction of these proceedings and have relied in part to sustain their position upon *J. M. Huber Corporation* v. *Denman,* 367 F. 2d 104 (5th Cir. 1966). The lower court in that case held that plaintiff lessors were entitled to royalties computed on the basis of actual "market value" of the natural gas, whether or not such value conformed to the rates being collected by the lessee-producer defendant, the Huber Corporation, which rates are regulated by the F.P.C. This ruling was affirmed in *J. M. Huber Corporation* v. *Denman, supra.* However, the court remanded the case for further proceedings with the following direction:

> "Specifically, the District Court should defer further action including fixing of the actual 'market price' pending invocation by the parties of a ruling by the FPC: (1) (a) as to the jurisdiction of the FPC over payment for royalties for gas sold for resale and transported in interstate commerce, (b) the status of a royalty interest owner's transaction as a sale under the Act where incident to a sale for resale and transportation in interstate commerce, (c) the status of the royalty interest owner's transaction in this case as a sale under the Act. . . ." 367 F. 2d at 121 [Footnote omitted.]

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[211] Dkt. No. 1225, KC-1969.

Plaintiffs thereupon petitioned the F.P.C. for a declaratory order that the Commission does not have jurisdiction over gas royalties paid them by the Huber Corporation.[213]

Meanwhile, royalty holders commenced lawsuits in Kansas courts seeking, as in *Huber, supra*, recovery of royalties computed not upon the F.P.C.-approved rates collected by their producer, Mobil, but upon the market value of gas produced and sold by it. Mobil thereupon invoked the primary jurisdiction of the Commission, seeking a determination that it does have jurisdiction over royalty payments to lessors.[214]

The Commission consolidated these two proceedings with one other,[215] which raised an identical basic question:

> "[C]an persons contractually entitled to royalty payments for natural gas sold for resale in interstate commerce be classified as 'natural-gas companies' within the meaning of the Natural Gas Act and subject to the jurisdiction of the Commission."[215]

The Commission defined the scope of the hearing to be held thus:

> "The hearing in these cases shall be confined to resolving whether the Commission has jurisdiction over a landowners' royalty interest in natural gas leaseholds and, if answered in the affirmative, how such jurisdiction should be implemented. • • • •

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[213] William Harvey Denman, Trustee v. J. M. Huber Corp. Dkt. No. RI67-113.

[214] Mobil Oil Corp. v. Carl F. Matzen, et al. Docket No. RI67-114.

[215] Western Natural Gas Co. v. Elmer Hennigh, et al. Docket No. RI67-310.

[215] Dkt. No. 1210, Ex. C, p. 2, KC-1969.

"The examiner will consider the questions raised in Docket No. RI67-114 with respect to helium only as the facts on this subject bear upon the royalty interest of landowners in natural gas leaseholds. These will in no way require consideration of any question foreclosed to this Commission's jurisdiction by the Helium Act. (74 Stat. 918) 50 U.S.C. Sec. 1671.

"Contractual issues relating to the specific royalty payments to which any particular lessor is entitled under this lease agreement will not be the subject of this hearing."[216]

So far as appears, helium was mentioned in only one of the three consolidated cases, Mobil Oil Corp. v. Matzen, et al. Mobil alleged that as lessee of Matzen, et al., it produced, sold and delivered all gas as entitled under its leases, excepting that it did not sell helium to its gas purchasers. Nowhere did it appear that the lessors relied upon the presence of helium in the natural gas as a factor in establishing market value.

In *J. M. Huber* v. *Denman, supra,* the Fifth Circuit referred to the F.P.C. the question of its own jurisdiction over royalty payments. Under Section 11 of the 1960 Helium Act Amendments, even that ground for referral is lacking, for thereunder the Natural Gas Act "shall not be applicable to the sale . . . of helium . . . [even] prior to . . . the separation of such helium from the natural gas with which it is commingled, whether or not the . . . Act [applies] to such natural gas. . . ." Thus, even if the Commission should assume jurisdiction over royalty payments, it would appear that it could not regulate any royalty demanded by a lessor attributable to helium alone.[217]

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[216] *Id.* at p. 3.

[217] See royalty provision in Shamrock Ex. 1, lease 103/4530.

The doctrine of primary jurisdiction is explained thus in *United States* v. *Western Pac. Railroad Co.*, 352 U.S. 59, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956):

> "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties . . . . 'Primary jurisdiction,' . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. . . .
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> "No fixed formula exists for applying the doctrine . . . . In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. . . . In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions . . . . More recently the expert and specialized knowledge of the agencies involved has been particularly stressed . . . The two factors are part of the same principle '. . . that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. . . .'" 352 U.S. at 63, 1 L. Ed. 2d at 132.

It is true that the Commission has long regulated the sale of natural gas for resale in interstate commerce, and that such gas does contain helium. However, the questions

here have not raised issues of fact "not within the conventional experience of judges," or questions requiring or warrantying the exercise of administrative discretion. The issues of whether title to helium passed under the leases, and whether royalties paid thereunder constitute payment for helium, raise factual and legal questions judicially determinable. Moreover, whether the Commission's jurisdiction extends to royalty payments received by lessors does not affect whether the lessors, or landowners have in fact conveyed the helium contained in that natural gas. If they have, or have not, it is not because of any jurisdiction, or lack of it, in the F.P.C. over royalty payments received by landowners.

Unjust Enrichment

Lessee-producers and landowners also claim the funds on the ground of unjust enrichment. The arguments previously considered constitute the premise by which they seek to enforce this claim.

They point out that when most of the leases and gas purchase contracts were executed, helium was regarded as only an inert diluent of the stream without value in itself, and that landowners, pipeline purchasers and lessee-producers had no reason to anticipate that Congress would suddenly recognize it as a valuable natural resource and create a major new market for it. They argue that they are "economically powerless" to extract it prior to delivery of the gas stream to the pipelines, pointing out that they can not, under the rules and regulations of the F.P.C., discontinue or abandon delivery of the stream. They justly regard the money received by the extraction companies from the United States as a "benefit" to the former, but complain that it accrues to those companies not at the expense of the United States, but to the expense and detriment of themselves, the landowners or the lessee-producers.

The unjust enrichment claim is based fundamentally upon alternative premises: 1) that title to helium did not pass under the leases or gas purchase contracts and that the extraction companies have converted it to their own use and benefit; and 2) that the pipeline purchasers paid only for hydrocarbons, and paid no consideration for helium, and now having sold it for valuable and substantial consideration, must respond from those proceeds to their vendors, for the fair market value of said helium.

We have already disposed of both premises. We have held that title to helium passed to the pipeline purchasers under their leases and gas purchase contracts, and secondly, that payment for gas under those contracts was not limited to the hydrocarbon portion alone, but was intended and received as payment for all constituents of the entire stream as produced from the well.

Landowners and lessee-producers find further support for their unjust enrichment argument in an alleged privileged position enjoyed by members of the helex group ever since the inception of the helium program. They argue that ever since Dr. Seibel's report in 1956, proposing the construction of extraction plants on large-volume pipelines leading from the Hugoton area, the government program has been oriented to pipeline extraction plants, without regard to the ownership of helium and that independent producers were never seriously considered as probable processors of helium. It is further argued that the contracts ultimately executed by the extraction companies insulate the latter from virtually all economic risk, providing guaranteed minimum sales for a 22-year period, at a guaranteed price, limited liability in the event of failure of title to helium, plus the realization of collateral economic benefits, such as decreased transportation costs of a gas stream from which inerts have been removed, and the removal of greater quantities of liquid hydrocarbons made possible by the extraction process.

The foregoing contract features and collateral economies would inure to the benefit of *any* party contracting with the United States in the conservation program. Assuming, *arguendo,* the contracts advantageously minimized the risks of undertaking helium extraction for the conservation program, and afforded participants favorable economies in other respects, these factors do not make the consequent enrichment of corporate coffers unlawful or inequitable as to third parties in any manner cognizable at law.

In preparing cost build-ups as a basis for negotiating the helium purchase contracts, the Bureau included as one of the contractors' costs, two dollars per Mcf for recoverable helium contained in natural gas processed for extraction. It said:

> "The initial unit price will be a negotiated price. On our side of the table, we will calculate what we consider to be a fair and reasonable price by first computing the estimated unit cost of extracting helium in a Government plant under similar circumstances, and then adding an amount to cover taxes, insurance, and any other costs applicable to a private plant, plus a 6½ per cent annual rate of return, after taxes, on the undepreciated plant investment . . . In this calculation, we will include as cost items in a Government operation a payment of $2.00 a thousand cubic feet for recoverable helium in the natural gas processed, and an appropriate payment for fuel gas and other gas shrinkage in the plant." [218]

Two views may be taken of this allowance. The Director of the Bureau of Mines justified it to the General Accounting Office as the fair and reasonable value of helium

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[218] LPX 91, App. 33.

in the stream, and a fair estimate of the helium cost the United States would incur in a government-owned plant. The Director wrote:

> "In negotiating prices with the companies, the Bureau considered the helium in the natural gas streams prior to processing to be worth $2.00 a thousand cubic feet. Because the helium content of the gas to be processed by the companies varies from company to company and because 100 percent of the helium in the gas cannot be economically recovered, the equivalent value of the recoverable helium in the natural gas varies from company to company—averaging about $2.30 a thousand cubic feet.
>
> "We considered this as an item of cost in our calculations because in our chosen approach it would have been an item of cost in a Government plant. The basic $2.00 figure is not an arbitrary figure. The Bureau of Mines is presently paying the equivalent of this amount for the privilege of extracting helium from gas supplied by gas companies at the Government's Keyes, Oklahoma and Shiprock, New Mexico plants." • • •
>
> "In view of the foregoing and in the light of abundant testimony by the Bureau of Mines before congressional committees relevant to the importance of helium, it is extremely unlikely that a value lower than $2.00 could be obtained either through negotiation or condemnation. *One might argue that helium currently wasted in fuel gases has no value, but such an argument becomes invalid when someone decides to extract the helium for conservation or sale. We believe the $2.00 figure represents a just and reasonable value for helium in natural gas processed for helium extraction, without regard to who does the processing. . . . Consequently, we did not require*

the companies to show that the $2.00 would be an item of cost, because we do not think it is pertinent." [219]

The Comptroller General viewed this allowance of $2.00 per Mcf for helium as mere profit to the contractors, totalling over the life of the contracts $144 million unjustified costs to the United States and equivalent profits to the contractors over and above the profits already provided in the cost build-up. In his report to Congress he stated:

"On the basis of our review of the Bureau's estimates of the contract unit prices, it appears that the Government will incur unjustified costs of at least $155 million. An equivalent amount will be received by the contractors as profits over and above the $158 million allowed as profits in the composition of prices prepared by the Bureau. Of the $155 million of unjustified costs, $144 million represents special allowance for the helium content in the natural gas . . . . The special allowances were included in the Bureau's initial estimates without establishing that any associated costs would be incurred by the contractors, and the negotiation records do not show that the contractors requested or required the special allowance as an added profit payment for the value of the contained helium. [p. 6]

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"We consider that it was inappropriate for the Bureau to have included in its estimates special allowances of $144 million for an element that was being dissipated when included in the natural gas sold as fuel. [p. 9]. • • •

"The fact that an amount equivalent to the $2 special allowance per MCF had been paid as a fee

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[219] LPX 182, p. 7.

> for permitting the Government to extract helium from natural gas at the Keyes plant did not necessarily mean that such amount should or need be paid under an entirely different contract arrangement under which the contractors would otherwise be provided a profit for their participation in the program." [p. 10.].[220]

It would appear that based upon the G.A.O. Report, landowners and the lessee-producers are contending that the extraction companies are being unjustly enriched, the former claiming it to be at the expense of the United States and its taxpayers, the latter deeming it to be at their own expense. The alleged enrichment of the extraction companies does not result from any breach of a legal or equitable duty owing to the lessee-producers or landowners. So far as appears, any profits result solely from the judgment of the Bureau of Mines in its estimation of the amount the Government determined its contractors would require to extract helium and this, in turn, was based upon the estimated cost to the United States to operate its own plants. In *Anderson* v. *Anderson,* 155 Kan. 69, 72, 123 P.2d 315 (1942), the court stated, quoting *University* v. *Forbes,* 88 N.H. 17, 183 Atl. 860:

> "'The doctrine of unjust enrichment is that one shall not be allowed to profit or enrich himself at the expense of another contrary to equity. While it is said that a defendant is liable if "equity and good conscience" requires, this does not mean that a moral duty meets the demands of equity. There must be some specific legal principle or situation which equity has established or recognized, to bring a case within the scope of the doctrine.'"

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[220] Comptroller General's Report, "Examination of Procurement of Crude Helium for the Helium Conservation Program under Negotiated Fixed-Price Contracts—Bureau of Mines—Department of the Interior." January, 1963. [LPX 185.]

A benefit is not unjust unless it is unlawful and the injustice must be one for which the law gives redress under its rules. The claim of unjust enrichment can only be made, if at all, by the United States and this it has not done. If the extraction companies are unjustly enriched by the United States, landowners and lessee-producers are not entitled to a share in the funds on the ground that it is at their detriment or expense.

SUMMARY

We summarize our conclusions respecting the claims of landowners as follows:

That landowners in each of the interpleader cases can sue and be sued herein as a single class, that the interests of all members of the landowner class in each case have been adequately represented by those named landowners appearing both individually and as representatives of absent members of each class, and that division of each such landowner class into subclasses is unnecessary to the adequate representation of the absent members of each such class;

That landowners are not barred by either waiver or estoppel from asserting that helium is not conveyed under their oil and gas leases;

That in any oil and gas lease, or lease for gas only, under which natural gas is produced from any field involved herein, which gas is subsequently processed for the extraction of helium, the words "gas" or "gases" are used interchangeably to describe any naturally-formed aeriform substances indigenous to the underlying reservoir, which aeriform substances include helium; and the natural gas stream conveyed under those leases includes, except as reserved, both hydrocarbon and non-hydrocarbon elements and compounds, including helium;

That in these interpleader actions, the Court has no jurisdiction of landowners' claims against their co-de-

fendant lessee-producers, for any separate or additional royalty for the helium constituent of the gas stream;

That the Court further has no jurisdiction to entertain landowners' claims for cancellation of the leases as to helium, for alleged breaches of implied covenants to market helium with reasonable diligence;

That landowners are not entitled to participate in the interpleader funds on the ground that plaintiffs are unjustly enriched at the expense and detriment of said landowners;

That Section 11 of the 1960 Helium Act Amendments did not abrogate the aforesaid leases, insofar as the conveyance of helium is concerned;

That royalty payments for natural gas paid and received by landowners under the lease agreements are not rendered illegal or insufficient as payment for helium because said payments were made by lessee-producers whose rates are regulated and approved by the Federal Power Commission.

We summarize our conclusions respecting the claims of lessee-producers as follows:

That named lessee-producers appear in each of the interpleader cases, both individually and as representatives of the class of lessee-producers described for each case, and that lessee-producers in each case may sue and be sued as a single class;

That defendant lessee-producers are not barred by waiver or estoppel to assert their claims to helium by their conduct respecting the contracts under which they sell and deliver natural gas to their pipeline purchasers, and that interpleading plaintiffs are likewise not barred by waiver or estoppel from asserting that their gas purchase contracts do convey and provide payment for helium;

That the natural gas purchase contracts under which lessee-producers sell and deliver gas to their pipeline company purchasers apply to and convey the entire natural gas stream, except as reserved, and the natural gas stream conveyed under those contracts includes both hydrocarbon and non-hydrocarbon elements and compounds, including helium;

That the parties to these contracts have not by their conduct with respect thereto, either expressly or impliedly amended, reformed, rewritten, or modified those contracts;

That payments received under those contracts by lessee-producers from their pipeline purchasers constitute payment for the entire natural gas stream measured and delivered thereunder, including both hydrocarbon and non-hydrocarbon constituents (including helium) of the stream, except as reserved to the seller;

That payments made and received under those contracts are not, thus, for hydrocarbons alone, or for British thermal units;

That the contracts thus construed are not so unconscionable, or against public policy, so as to be invalid and unenforceable under the circumstances;

That Section 11 of the 1960 Helium Act Amendments did not abrogate those contracts insofar as the conveyance of helium is concerned;

That payment for natural gas made and received under those contracts are not rendered illegal, or insufficient, as payment for helium because said payments are made at rates regulated and approved by the Federal Power Commission;

That no lessee-producer is entitled to recover, as payment for helium, the difference, if any, between any price stated in its natural gas sales contracts, or in any contract price resulting from an arbitration award, and the

FPC-approved service rate being collected, whether the contract price is or is not approved for collection subject to refund;

That lessee-producers are not entitled to participate in the interpleaded funds on the ground that plaintiffs in interpleader are being unjustly enriched at their expense and detriment.

From all of the foregoing conclusions, it follows that the landowners' claims against the United States in Case No. W-3009 and Case No. W-3159 must fail. We have found that the landowners did, in fact, convey to their lessees all rights to helium, except as may be reserved, as a part of the natural gas stream. Lacking title, landowners' claims for conversion of helium under the Tort Claims Act, 28 U.S.C. § 1346(b), must fail. Likewise, based upon the findings herein, their standing to claim a taking of *their* property without just and reasonable compensation, the reverse condemnation claim under the Tucker Act, 28 U.S.C. § 1346(a)(2), must be denied.

Costs

Rule 54(d), F.R.Civ.P., provides in pertinent part as follows:

> "Except when express provisions therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.* * *"

Allowance of costs to the prevailing party is not an inexorable rule, and the Court may, in its discretion, direct otherwise. We think these cases are particularly appropriate for such direction.

The issues which plaintiffs in the interpleader cases raised for determination are of considerable magnitude, both in the numbers of persons affected thereby, and their financial importance to all claimants to the funds. In each of the interpleader cases, plaintiffs have obtained, in net effect, an adjudication that quiets their title to all helium sold to the United States. The possible rights of ownership of helium in other parties was recognized in each of the contracts from which the interpleader funds derive. The financial burden of any adjudication of liability adverse to plaintiffs was minimized by provisions in each contract requiring the United States to reimburse said companies for all amounts paid by them to any third party or parties found to own said helium, to the extent that such payments exceeded approximately three dollars per Mcf of contained helium.

The interpleading plaintiffs, because of their position in the gas industry, are the beneficiaries of a decision of the United States to undertake the necessary conservation of helium. The government enlisted the participation of private enterprise, and interpleading plaintiffs were advantageously circumstanced to so participate. The plan to locate extraction plants on pipelines was formulated within the Bureau of Mines as the most efficient and expeditious means of helium conservation, without regard to possible ownership rights vested in other persons. The helium purchase contracts with the four extraction companies were entered into, certainly, on the expectation that their ownership of helium and extraction rights was complete. Plaintiffs herein have undertaken to secure a final adjudication of those rights, and we think it only just and equitable that those parties bear the statutory costs (see 28 U.S.C. § 1920), and the cost of notice to claimants (as hereafter ordered by the Court), all of which were incurred in obtaining a foreclosure of all other rights of ownership to helium which they sell to the United States.

As stated earlier herein, infra, p. 25, we cannot determine in these cases the res adjudicata extent of the judgments to be entered here. However, it is in the interest of justice and economy of litigation, that the extent of the judgments entered herein be as broad as is constitutionally permissible, and this interest may be materially assisted by notice to all absent members of the classes of landowners and lessee-producers prior to entry of judgment.

Accordingly, within thirty days, prevailing counsel will prepare, circulate, and submit the following, consistent with the views expressed herein:

1. A form of notice to be given absent lessee-producers and landowners;

2. A form of judgment denying landowners' and lessee-producers' claims to the interpleader fund, dismissing, for want of jurisdiction or on the merits, the cross claims and counter-claims of landowners, and permanently enjoining said parties from asserting the claims disposed of in these actions; and further, in the suits against the United States, the motion of the United States for judgment is to be sustained. Such form of judgment shall include provision for taxation of costs in accordance with the Court's views, as expressed herein.

The foregoing findings of fact and conclusions of law are made in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure.

Dated at Wichita, Kansas, this 7th day of September, 1968.

/s/ WESLEY E. BROWN
United States District Judge

APPENDIC C

Opinion and Order of the United States District Court for Kansas Determining Method and Manner for Fixing and Taxing Costs, Filed June 17, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

NORTHERN NATURAL GAS COMPANY, et al, *Plaintiffs,*

v.

RALPH GROUNDS, HENRY HITCH, et al, *Defendants.*

Civil Action No. KC-1969

(Consolidated with Civil Actions Nos.
KC-1945, -46, -47, -48, KC-1980, W-3009
and W-3159)

MEMORANDUM AND ORDER DETERMINING METHOD AND MANNER FOR FIXING AND TAXING COSTS

In the Court's Memorandum Decision of September 7, 1968, as corrected October 14, 1968, 292 F. Supp. 619, 688, it was ruled upon equitable considerations that prevailing plaintiffs should bear the statutory costs in these actions. Thereafter on April 15, 1969, journal entry of judgment was filed in accordance with the decision of this Court, taxing costs to named plaintiffs, the helium extraction companies, and pursuant to order, those parties seeking to tax costs have filed itemized and verified bills, and hearing was held on May 23rd for the purpose of determining what costs are within the language of the Court's decision. Thereafter lessee-producers filed Motion to Defer Settlement of Bills of Costs pending final determination of the appeal in this case, and plaintiffs, the Helex group, have filed Brief in opposition to any postponement of the cost issue.

The Court has determined that all pertinent issues should be settled and finally resolved upon appeal in this

case, and that in view of the present indication of the costs in this action, a determination of the basis upon which this Court will decide that issue should now be made. Accordingly, the Motion of Lessee-Producers to Defer Settlement of Bills of Costs is overruled except insofar as the Court's fixing of a dollar amount is required. The dollar amount will be determined after the appeals now pending in accordance with the views expressed herein unless otherwise modified by the appellate courts.

It seems unnecessary to again observe that these consolidated actions were most unusual in scope, both in the nature of the subject matter and the vast number of persons who were and will be affected by the decision of this Court. It was estimated that there were approximatey 30,000 persons who receive income from the production of helium-bearing gas by virtue of ownership of land, mineral interests and/or royalty interests. 292 F. Supp. at 633. The actions have required lengthy, extensive and costly discovery proceedings, many hours of legal research and numerous court appearances apart from actual trial. In reviewing the files for the purpose of making a decision upon costs, a mere reading of the 2,156 Docket entries attests to the staggering scope of these actions. In addition, the Court notes that 32 days of court hearings were had, apart from the actual trial, which covered approximately 43 days. The testimony of 68 persons was taken by deposition, and during trial the Court heard testimony from 28 witnesses, in addition to transcribed testimony of 55 others presented by deposition. A total of 1,610 Exhibits were introduced into evidence, and many of these proved exceedingly costly to research, prepare and assemble in a form which would be useful to the Court.

The Court has said before and will say again that it has been impressed throughout these proceedings with the high quality of counsel's representation of all parties.

Without their aid and the thorough preparation and presentation of evidence on behalf of all interested persons, the Court would have been greatly hampered in reaching the decision which it believes was required under the law. With respect to representation in the class actions, the Court can only repeat its observation at 292 F. Supp. at 635:

> "... the representation by counsel for both the landowner and lessee-producer classes has been of the highest quality. Their presentation reflected diligent, careful and incisive attention to the interests of the class. In addition to the most careful investigation by deposition, interrogatories and other discovery of facts, they have explored fully, in evidence, briefs and arguments, what must surely be every conceivable theory which the facts could possibly support."

By our findings of the capable representation of the various classes, we do not infer that the interpleaders were not equally represented. The services of the attorneys and exhibits furnished by the Helex group were obviously beneficial to the integrity of the fund and to the Court.

After consideration of the actions as a whole, with attention to the briefs and arguments of the parties lately submitted with reference to proper taxation of the costs herein, the Court makes the following findings on the costs issue. We are of the opinion that all costs should be taxed against the "fund" as defined by the Court in these cases. In arriving at this determination, the Court has been guided principally by a consideration of whether or not a particular expense has been of real aid and assistance to the Court and parties in presentation of the case. In this connection, the Court has applied principles and considerations discussed in the following cases:

Bank of China v. *Wells Fargo Bank & Union Trust Co.* (9th Cir. 1953) 209 F. 2d 467

City of Wewoka, Okla. v. *Banker* (10th Cir. 1941) 117 F.2d 839.

O'Hara v. *Oakland County* (6th Cir. 1943) 136 F.2d 152.

Clark v. *Hot Springs Electric Light & Power Co.* (10th Cir. 1935), 76 F.2d 918, cert. denied, 296 U.S. 624, 80 L. Ed. 443.

Farmer v. *Arabian American Oil Co.*, 379 U.S. 227, 13 L. Ed. 2d 248 (1964)

Sprague v. *Ticonic National Bank*, 307 U.S. 161, 83 L. Ed. 1184 (1939)

Fleischmann v. *Maier Brewing Co.*, 386 U.S. 714, 18 L. Ed. 2d 475.

United States v. *Arizona Canning Co.* (10th Cir. 1954), 212 F.2d 532.

United States v. *Kolesar* (5th Cir. 1963) 313 F.2d 835.

Twentieth Century Fox Film Corporation v. *Goldwyn* (9th Cir. 1964), 328 F.2d 190, 222-224, cert. denied, 379 U.S. 880, 13 L. Ed. 2d 87.

Euler v. *Waller* (10th Cir. 1961) 295 F.2d 765.

Brisacher v. *Tracy-Collins Trust Company*, (10th Cir. 1960) 277 F.2d 519

Advance Business Systems & Supply Co. v. *SCM Corporation*, (D.C. Md. 1968) 287 F. Supp. 143, 161-166.

Bank of America v. *Loew's International Corp.* (S.D. D.C. N.Y., 1958) 163 F. Supp. 924.

Cf. *In re Estate of Sowder*, 185 Kan. 74, 86-87, 340 P. 2d 907 (1959).

See also, *Peck, Taxation of Costs*, 37 F.R.D. 481, 43 F.R.D. 55, 6 *Moore's Federal Practice* § 54.77(2).

A. Items to be Allowed and Taxed

1. Costs of all parties for docket fees and costs of briefs as provided in 28 U.S.C. § 1923.

2. Costs of all parties under 28 U.S.C. § 1920 for fees of the Clerk of this Court and Marshal, as provided by 28 U.S.C. §§ 1914, 1917, 1921.

3. Cost and fees of Court Reporter for original copy of the trial transcript. In addition, cost of four (4) copies of the trial transcript will be allowed, one copy being for the use of the Court, with the remaining three copies provided for the use of the Landowners, the Lessee-Producers, and the Helex group.

4. Cost and fees of Court Reporter for original copy of transcript of pre-trial conferences. In addition, cost of four (4) copies of such transcripts will be allowed, as provided in ¶ 3 above.

5. Cost and fees of Reporters for original transcripts of all depositions, whether or not such depositions were received in evidence. In addition, cost of four (4) copies of such depositions will be allowed, as provided in ¶ 3 above.

6. All printing costs of all parties for briefs, motions, and orders filed in this Court.

7. All costs of all parties for preparation, mailing and and publication of notices required by order of the Court.

8. Witness fees for all parties as provided by 28 U.S.C. § 1821. This shall include all witness in attendance upon this Court, or appearing before any person authorized to take his deposition, said fees to be paid at the rate of $4.00 per day, and 8 cents per mile for going from and returning to his place of residence. Persons who attend from points far removed from their residence shall be entitled to an additional allowance of $8.00 per day for

subsistence. Mileage costs shall be allowed for actual mileage, and are not to be limited to a 100 mile area surrounding Wichita, Kansas.

Costs and expenses of expert witnesses shall not be allowed unless prior approval of this Court was obtained prior to such testimony.

9. Costs and fees of all parties for exemplification and copies of all papers and documents necessarily obtained for use in these actions. This shall include cost of furnishing lease information required by the Court and providing lists of names and other expenses particularly connected with representation of absent parties in the class actions.

10. Costs and fees incurred by all parties in preparation of exhibits. These costs shall include all necessary expense of research, and assembly as well as all expense of photostatic copying or exemplification of charts and drawings in connection therewith, and may include such clerical expense as is directly related to such preparation.

B. Items Which are Specifically Disallowed

1. Cost of expert witnesses expended without prior approval of the Court.

2. All personal expenses of counsel in attending depositions, searching records, or in preparation of trial.

3. Telephone and postage expense, with the exception of postage expense directly incurred in connection with notices in class action suits, incurred pursuant to Order of the Court.

4. All clerical and overhead expenses, except insofar as such expense may be directly related to preparation of exhibits and cost of notices in the class action suits, incurred pursuant to Order of the Court.

5. Cost of legal services of Kline & Tinker, F.P.C. "specialists", incurred in connection with witness Connole.

The Court has determined that the costs outlined in general terms in Section A above, shall be settled and allowed to all parties in this action at the conclusion of appellate review, the same to be taxed against the fund in controversy. In addition to these costs, the Court has further determined that reasonable attorneys' fees shall be allowed to the attorneys for the parties in the actions, the same to be likewise taxed against the fund. Without fixing a dollar amount at this time, it is the intention of the Court, and it is so determined, that three separate reasonable attorney fees shall be set, to be awarded in a lump sum to each of the three groups of interested persons—that is, one total fee to attorneys for the landowners, one total fee to attorneys for lessee-producers, and one total fee for attorneys for the Helex interests. It will be the further order of the Court that such fees shall be equitably apportioned among counsel within each group.

In accordance with the foregoing Memorandum,

IT IS ORDERED that all parties submit, or resubmit bills of costs for final approval by this Court, in accordance with the guidelines provided herein at the conclusion of the various appeals unless otherwise modified or determined by such appellate courts upon review of our decision, orders and judgments.

At Wichita, Kansas this 17th day of June, 1969.

/s/ WESLEY E. BROWN
United States District Judge

APPENDIX D

Opinion of the United States Court of Appeals in Banc, Affirming Jurisdiction of the District Court and Affirming Orders Denying Motions for Dissolution of Injunctions, Dated February 11, 1964 (327 F.2d 1003)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 7580-7584, 7588

RALPH GROUNDS, ET AL., *Appellants,*

v.

NORTHERN NATURAL GAS COMPANY, a corporation, NORTHERN HELEX COMPANY, a corporation, and TEXACO, INC., *Appellees.*

RALPH GROUNDS, ET AL., *Appellants,*

v.

NATIONAL HELIUM CORPORATION, a corporation, *Appellee.*

O. W. HEGER, ET AL., *Appellants,*

v.

CITIES SERVICE GAS COMPANY, a corporation, *Appellee.*

KATHERINE R. ADAMS, ET AL., *Appellants,*

v.

CITIES SERVICE GAS COMPANY, a corporation, *Appellee.*

PAN AMERICAN PETROLEUM CORPORATION, a corporation, *Appellant,*

v.

CITIES SERVICE GAS COMPANY, a corporation, *Appellee.*

BLOYD BURGESS, ET AL., *Appellants,*

v.

CITIES SERVICE GAS COMPANY, a corporation, *Appellee.*

Feb. 11, 1964

Appeals from the United States District Court for the District of Kansas; Wesley E. Brown, District Judge.

James E. Grigsby, Oklahoma City, Okl., for appellants, Royalty Owners.

Byron M. Gray, Topeka, Kan., for National Helium Corp.

Joe Rolston, Wichita, Kan., for Northern Natural Gas Co. and Northern Helex Co.

Charles Lindberg, Oklahoma City, Okl., for Socony Mobil Oil Co.

Charles V. Wheeler, Oklahoma City, Okl., for Cities Service Gas Co.

George C. Spradling, Wichita, Kan., for Pan American Petroleum Corp.

Malcolm Miller, Wichita, Kan., for Texaco, Inc.

Before MURRAH, Chief Judge, and PICKETT, LEWIS, BREITENSTEIN, HILL, and SETH, Circuit Judges.

PER CURIAM.

These appeals are from interlocutory orders affirming jurisdiction of the United States District Court for the District of Kansas and from orders denying motions for the dissolution of injunctions. Such orders are all severally affirmed. This action is not intended to decide any issue going to the merits of any case.

APPENDIX E

Opinion of United States District Court of Kansas Overruling Motions To Dismiss for Lack of Jurisdiction and Denying Motions for Dissolution of Injunctions, Dated September 13, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. KC 1945

CITIES SERVICE GAS COMPANY, a corporation, ET AL., *Plaintiff*

v.

SOCONY MOBIL OIL COMPANY, a corporation, ET AL., *Defendant*

No. KC 1946

CITIES SERVICE GAS COMPANY, a corporation, ET AL., *Plaintiff*

v.

ASHLAND OIL & REFINING COMPANY, a corporation, ET AL., *Defendant*

No. KC 1947

CITIES SERVICE GAS COMPANY, a corporation, ET AL., *Plaintiff*

v.

COLUMBIAN FUEL CORPORATION, a corporation, ET AL., *Defendant*

No. KC 1948

CITIES SERVICE GAS COMPANY, a corporation, ET AL., *Plaintiff*

v.

PAN AMERICAN PETROLEUM CORPORATION, a corporation, ET AL., *Defendant*

No. KC 1969

NORTHERN NATURAL GAS COMPANY, a corporation, and NORTHERN HELEX COMPANY, a corporation, *Plaintiff*

v.

RALPH GROUNDS, HENRY HITCH, JR., ET AL., *Defendant*

No. KC 1980

NATIONAL HELIUM CORPORATION, a corporation, *Plaintiff*

v.

PANHANDLE EASTERN PIPE LINE COMPANY, a corporation, ET AL., *Defendant*

MEMORANDUM OF OPINION

The above six actions are interpleader actions filed pursuant to 28 U.S.C.A. 1335, Rule 22, and related statutes.

The present matters before this court concern the motions of royalty owners in all six cases to dismiss the interpleader actions filed herein; royalty owners motions in four Cities Service cases to vacate preliminary injunction, Socony Mobil Oil Company's motion to dismiss and for a more definite statement; and Pan American Petroleum Company's motion for summary judgment. The latter two motions are both filed against Cities Service Gas Company.

The Court, because of the similarity of the motions and the issues involved therein, ordered the motions argued together and in effect consolidated the cases for the purpose of disposition of the motions. These six cases have substantially similar origins and present substantially similar questions of law and fact.

In the disposition of the motions the factual situations have been determined by the pleadings, the affidavits on file, and insofar as applicable as facts the historical background of the statutory proceedings with respect to the subject matter of these actions.

Cities Service is a Delaware corporation having its principal place of business in Oklahoma and is engaged in the business as an interstate natural gas transmission company operating pipe lines within the States of Kansas, Oklahoma and Texas. Pan American, Ashland Oil and Refining Company, Columbian Fuel Corporation, and Socony Mobil Oil Company are all producers of natural gas in the "Hugoton gas area", holding leases from royalty owners and their predecessors in interest. The other defendants are royalty owners with whom the producers have leases.

Northern Natural Gas Company (Northern) and Northern Helex Company (Helex) are plaintiffs in the action No. KC 1969. Northern is a natural pipe line company,

which purchases natural gas from producers in the "Hugoton gas area" in Texas, Oklahoma and Kansas. Helex is the owner of a processing plant and is engaged in the process of extracting "helium gas mixture" from natural gas produced from the "Hugoton gas area" and is a subsidiary of Northern. Both of these corporations are Delaware corporations authorized to do business in the State of Kansas. The defendants, Grounds, et al, with the exception of the corporate defendants are "individual royalty owners" of natural gas or royalty interest subject to producing gas leases covering lands in the "Hugoton gas area". The corporate defendants are producers and include Socony Mobil, Cities Service Oil, Texaco, Phillips, Helmerich and Payne, Gulf, and Hugoton-Plains, none of whom are Kansas corporations. These producers sell the gas to Northern and Helex and account to the royalty owners for their proportionate share of such sale in accordance with the lease in effect. Helex has a contract for the sale and purchase of helium gas mixture with the United States of America. National Helium Corporation (National) is a Delaware corporation, is engaged in the extraction of helium gas which it obtains from Panhandle Eastern Pipe Line Company (Panhandle). Panhandle produces and purchases natural gas produced in Kansas, Oklahoma and Texas and has a contract with National under the terms of which National pays a contractual sum to Panhandle for the helium obtained from the gas sold to it. The gas produced by the producers is sold to pipe line companies by the producers. Pipe lines pay the producers for the gas received and the producers in turn pay the royalty owners their proportionate share of gas produced in accordance with the terms and conditions of the leases held by producers.

Shortly before the present interpleader actions were filed in this court some 550 royalty owners filed four actions in the District Court of Texas County, Oklahoma seeking a declaratory judgment that Cities Service had no title to the helium in the gas; that the royalty owners were the owners

of the helium; and that Cities Service was liable to the royalty owners for the proceeds of the sale of helium by Helex to the United States Government. The royalty owners also commenced a suit against Panhandle and National Distillers & Chemical Corp. for declaratory judgment in the same forum claiming the same relief. Royalty owners have also commenced a suit in the same forum against Northern and Helex seeking the same relief.

The royalty owners, as far as the records before this court are concerned, formed a Texas Land and Royalty Owners Association, and on December 7, 1962, adopted a motion endorsing the effort of the Helium Conservation Association to obtain a legal ruling "holding the title to all helium rights belong to the individual mineral owners and do not belong to the gas company leasing the land", and that they "assist this effort in every possible manner". A letter soliciting the cooperation of royalty owners in Kansas was sent out including an employment contract and assignment of interest and setting up meetings in Kansas to discuss, with a representative of the royalty owners' association, at some eight cities in the State of Kansas, this "matter". The letter to the Kansas royalty owners signed by one Hitch advised that he felt that the Kansas royalty owners rights could be more effectively protected at less individual expense "if we join with the Oklahoma and Texas mineral owners and present a large, unified front of hundreds of mineral owners rather than trying to establish our right separately in a low helium area with less land owners."

The six actions filed in this court were all brought as interpleader actions to require the defendants to interplead in the respective actions setting up their respective rights to the "fund". The fund in effect being the proceeds from the sale of helium after deducting the cost of its production. In each instance the court issued an order permitting the plaintiff to file a bond in lieu of deposit of interpleader fund under 28 U.S.C.A. 1335 and approved the bond. The

bonds in lieu of the interpleader fund were in different amounts depending upon the plaintiff in the case. Preliminary injunctions were issued against the defendants by this court although the file does not indicate the issuance of an injunction in the National v. Panhandle case.

Generally speaking, the motions of the defendants are sought to be sustained on the following basis:

1. That the plaintiff has deposited in the registry of the court the wrong fund.

2. The fund actually deposited is not a fund about which there can be legally a controversy under the facts.

3. There is in fact no controversy among the defendants as to such fund.

4. All persons who may have or claim an adverse interest are indispensable parties and must be made parties defendant and service obtained on them.

5. That this court is not under any duty to exercise jurisdiction in this case.

6. That plaintiffs' do not come into court with clean hands because they are selling helium at $11.78 per m.c.f. when it interpleads the helium only at 12 cents per m.c.f. (This applies primarily to Cities Service).

For the purposes of these motions it may be said that each of the leases executed by the land owners contain three pertinent provisions:

(a) The granting clauses leased the lands described for the purposes of producing oil and gas.

(b) The land owners and mineral interest owners warrant their titles to the lessee, and

(c) The lessees agree to pay the land owners a royalty on gas produced from a "well where gas only is found".

The contracts with the producers to the pipe line companies and/or extracting companies warrant the title to the

gas sold to such companies. The lease of the land owners were all entered into prior to the time that helium became of national importance and therefore economically useful.

The importance of helium to the nation as a whole may best be described from the Senate Report No. 1814 with respect to the Helium Act Amendments of 1960. The Court, in arriving at its factual determination in this case, has taken judicial notice of this report. It is quoted in some detail as follows:

> "Purpose. The primary objective of H.R. 10548 is to furnish authority to the Department of the Interior to carry out an effective, long-range program for the production, distribution, and storage of helium in order to assure a sustained supply, taking into account supplies from other sources, to meet essential Government needs. Provision is made for cooperation by the Department of Defense and the Atomic Energy Commission. The measure also clarifies and perfects certain of the existing provisions of the Helium Act.
>
> "H.R. 10548 is written in the form of a total amendment to the act of September 1, 1937 (50 Stat. 885), as amended (50 U.S.C. 161, 163-166). The 1937 act was itself in the form of an amendment to the act of March 3, 1925 (43 Stat. 1110).
>
> "Background. Since 1925 when the Congress enacted the first Helium Act, the Government of the United States, through its Department of the Interior, has operated a virtual monopoly in the production and sale of helium gas.
>
> "So far as this committee knows—and it has inquired painstakingly into the subject—there are no substantial deposits of helium gas anywhere in the Western Hemisphere except in the United States.
>
> "The annual consumption of helium gas today in the United States is approximately 370 million cubic feet,

which is 80 times the level of consumption in 1937. Helium gas is essential to our missile and atomic energy programs and also is increasingly valuable as industrial material. Seventy percent of the helium gas now being consumed in the United States is used directly by the Department of Defense, the Atomic Energy Commission, the National Aeronautics and Space Administration, and other Federal agencies. An additional 20 percent is used in industry on Federal defense and atomic energy contracts. Smaller but important quantities are used in hospitals and in research.

"Approximately 10 percent of the present production of helium gas is used in the so-called civilian industrial field, i.e., by consumers who do not have Government contracts. To illustrate, helium gas is used as a shield in welding processes involving aluminum, titanium, and other lightweight metals.

"The upward trend in helium demand in all fields is expected to continue. Many present-day uses, including those in the missile, nuclear energy, and industrial fields, are in the early stages of development. The new field of cryogenics involving extremely low temperatures in the region of absolute zero opens up exciting new frontiers of science. Temperatures within 20° of absolute zero cannot be attained without the use of helium gas.

"Helium is a limited natural resource usually found in only a few natural gas fields. The helium-bearing gas in the principal deposits in Texas, Oklahoma, and Kansas is being produced and marketed for fuel in the Midwest without regard to the concomitant waste of helium. The helium goes along with the combustible portion of the gas and passes through the gas burners into the atmosphere without serving any useful purpose.

"The volume of helium wasted daily in fuel gases is about 10 times as great as the present daily helium

consumption in the United States. If this loss is allowed to continue unabated and if the demands for helium increase in the future as expected, the helium-bearing gas sources in the United States cannot be expected to be adequate for national needs past 1980-85.

"The need for an effective helium conservation program was studied intensively during 1957-58 by the Department of the Interior in collaboration with the Department of Defense, the Atomic Energy Commission, the Department of Commerce, the Bureau of the Budget, the Office of Civil and Defense Mobilization, and the Federal Power Commission. In a report dated January 24, 1958, these agencies unanimously recommended a new national helium conservation policy. The policy was approved by the President.

"The legislation now being considered is essentially the legislation that was subsequently recommended to the Congress by the Secretary of the Interior. The Secretary first submitted a draft bill to the President of the Senate and the Speaker of the House on August 18, 1958. A slightly revised version of the proposed legislation was submitted by the Secretary on July 27, 1959.

"Earlier Helium Acts. The original Helium Act (approved March 3, 1925) was written at a time when helium was believed to be scarce and when its potential uses were not recognized.

"In response to an executive communication, legislation was introduced in the 75th Congress for the purposes of authorizing Government plants to produce and sell helium for commercial, scientific, and medical use and of regulating and restricting the exportation of helium. At that time the Government operated a helium plant and there was one private commercial producer of a small quantity of helium. The high unit costs of production of this supplier were such as to bar

extensive nongovernmental use of helium in the medical, aeronautical, and other fields. Under the legislation, which became the act of September 1, 1937 (50 Stat. 885), the Government acquired the plant and property of the sole private producer.

"As shown in House Report 1540, 75th Congress, the intention of the Congress in enacting the 1937 act was not to supplant individual enterprise or to establish a Government monopoly but to permit the consolidation of the then existing two agencies of production in order to effect economies and permit lower selling prices both to the Government and to private users. The expectation of the Congress that helium would thus come to be more widely used has been abundantly fulfilled.

"Under today's level of annual helium consumption and with prospects of future growth virtually unlimited, the principle of economy through centralized Government production and distribution, which was the leading factor contributing to the 1937 act and program, is no longer the predominant force it then was, and there is increasing reason to encourage private industry to undertake helium production.

"Explanation of the Bill. The measure provides essentially for a conservation program and envisions the possible construction of up to 12 new plants located on helium-bearing gas pipelines to extract the helium that would otherwise be wasted from the gas before this combustible gas goes to fuel markets. The helium extracted would then be stored underground in the Government-owned Cliffside gasfield near Amarillo, Tex., until needed in the future. Other underground storage areas could be utilized as needed.

"The legislation would provide for industry being invited to participate in the program by financing, building and operating plants to separate helium from natu-

ral gas, with the helium then being purchased and conserved by the Government through the Department of the Interior. The committee was assured by representatives of the Department of the Interior that the program would be carried out without adversely affecting the flow of natural gas committed to fuel markets. The legislation would provide new legal authority to make such participation by industry possible, which cannot be done under present statutes. The long-term contracts contemplated under this act would make it feasible for private industry to negotiate with banks and other financial institutions for the capital necessary to build separation plants. If, however, private industry should not indicate a willingness and capability to perform as a helium producer in a reasonable time, the Government could undertake the program as a Government operation.

"Congressional committee hearings developed information concerning the existence of reserves of helium-bearing gases other than the combustible fuel gases involved in the conservation program developed by the Department of the Interior. Testimony before the House and Senate Interior Committees indicates that potentially large sources of helium gas are in the Pinta Dome field in Arizona and in three or four isolated fields in Colorado. The committee took notice of the importance of these deposits and of the role they should play in any helium conservation program or expansion of the so-called civilian market for this strategic material.

"The scope and dimension of the program authorized and to be developed under the present legislation should be determined and adjusted from time to time through normal governmental processes, including congressional review of Government operations and congressional consideration of future appropriation requests for continuation of the program.

"The authority given to the Secretary of the Interior by H.R. 10548 is therefore not limited to the implementation of this specific program presented by the Department of the Interior. It is necessarily broad and general and may be applied in any part of the country should a more economical or feasible system of helium conservation become available including reliance upon sources of helium not associated with combustible gases.

"Cost. An effective helium conservation program will probably require a sizable outlay of Federal funds in its early years. The committee knows of no method other than that which this legislation will provide to assure a continuous supply of helium for the national defense and other essential Government activities, but it expects the Secretary of the Interior, in administering the act, to give reasonable opportunity for and encouragement to the growth of a privately owned and operated helium industry and thus to keep the costs of the Government program to the minimum consistent with the objectives of the policy of Congress.

"Although, as indicated above, the present approved departmental program may have to be altered in the light of discoveries and other future developments, this program is the best evidence presently available of the probable costs involved in H.R. 10548.

"The legislation authorizes borrowing from the Treasury, in amounts authorized in regular appropriation acts, over a period of 25 years. The Department plans to borrow up to $255 million. Repayments to the Treasury from the helium production fund as set up in the bill in the succeeding years would amount to $500 million, fully assuring return of the amounts borrowed and interest thereon. Thereafter operation of the system or program would presumably produce an annual net income to the Treasury.

"The program indicates that administration of the act, as proposed in H.R. 10548, would not in the long run involve a subsidy from the Treasury."

The magnitude of the present cases before this court is reflected in the various briefs and statements of counsel in their arguments to support their respective positions. These may be summarized briefly as follows:

There are approximately 3100 various land owners who have an interest in the outcome of this litigation and who are located in Kansas, Oklahoma and Texas in what is known as the "Hugoton gas area". There are some 49 different types of leases which have been executed by land owners and producers with respect to the gas produced from this area. The cost of extracting helium runs into millions of dollars for the construction of the extracting facilities alone, and according to the royalty owners, the United States by contract has agreed to pay Helex, just one of the extractors, over nine million dollars per year for a period of twenty-two years.

The defendants generally contend that the fund which the plaintiffs have deposited are computed on the basis of a percentage of the proceeds from the sale of gas to the extractors. For example, Cities Service has computed the fund on the basis of one-half of one per cent of the proceeds from the sale of gas by it to Helex. The fund thus deposited with the court pursuant to 28 U.S.C.A. 1335 in order that the court may acquire jurisdiction over the subject matter of this controversy, is therefore the wrong fund because it does not include the full amount which the United States is paying for helium to the various extractors. The proper fund according to Pan American is the fund which the royalty owners sought in the original action in the Oklahoma State Court and which is based on the proceeds of the sale of helium by the extractors to the United States. Thus the wrong fund being deposited, this court lacks jurisdiction over the subject matter of the controversy.

It is recognized that in fact no fund of money has been deposited with this court and that a bond has been deposited instead, the language of which is conditioned " • • • upon the compliance with the future order or judgment • • • " of this court. The defendants' theory, however, is that the bond is in lieu of the fund of money actually in deposit, that the bond stands in place of and represents such fund, and that if the bond is computed by reference to the wrong fund of money, jurisdiction of this court is just as fatally affected as if the wrong fund of money itself were actually on deposit. It should be pointed out here that there are no motions to increase the amount of the bond as being inadequate.

The principal issue in dispute in all of the cases before this court is not the ownership of the fund of money as defendants contend but rather the ownership or claim to ownership of the helium interest under the mineral leases. The money, as such, here in dispute, is derivative from and secondary to the helium interest. It merely reflects the helium interest in the terms of the market value. The market value of helium is merely a part of the establishment of a claim of the defendants which is not a point for our determination upon these motions. If the money fund here in question were enlarged or decreased or even totally removed no significant affect, on this lawsuit under its present posture, would result. But if the ownership of the helium interest under the terms of the mineral interest were removed from this case, there would be no lawsuit. We hold that the subject matter of controversy as contemplated by the interpleader statute is the claim of ownership under the mineral leases of the helium produced and marketed.

The contention that this action involves only the question of the ownership of a fund of money and that to acquire jurisdiction this court must have the actual and entire fund before the court is, in our opinion, erroneous. We do not consider this as such a case as was before the courts in

Gannon v. *American Airlines* (CA 10, 1958) 251 F. 2d 476, cert. denied, sub nom. *Gannon* v. *Britton,* 350 U.S. 886, 100 L.Ed. 781, 76 S.C. 140, and similar cases wherein there was an ascertained sum in dispute. The fund which defendants allege is in dispute, arises out of contracts made between extractors and the United States Government. As an example the Helex contract with the United States dated August 22, 1961, has a minimum life of twenty-two years and a maximum life co-extensive with the producing life of the wells, in the "Hugoton gas area" one of the biggest gas fields producing helium now developed.

It is obvious that under this argument at least twenty years and perhaps many more must pass before there will be such a sum certain and definite as could be completely dispositive of the issue before the court as the defendants contend. It is our opinion that an interpleader action such as this, the court's jurisdiction depends upon the bond which in this instance is "conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy".

We have no quarrel with defendants' contention that where a fund of money is placed in the registry of the court, the court's jurisdiction extends only to the fund actually on deposit and the court may not make orders in respect to future monies which subsequently may be attributable to the same fund. *Lowe's Inc.* v. *Hoyt Mfg. Corporation* (DC, NY, 1949) 83 F. Supp. 863. But defendants' argument, if valid, would deprive Federal Courts of jurisdiction of matters of this type for an indefinite period of years and defeat the announced purpose of the statute.

The interpleader statute is to be liberally construed, *Douglas-Guardian Warehouse Corporation* v. *Ramsey Seed Company* (CA, Nebr. 1959), 271 F.2d 24, and defendants position would, in our opinion thwart the purpose of the interpleader statute which is to prevent double vexation

in respect of one liability. *National Fire Insurance Company* v. *Sanders* (CA 5, 1930), 38 F.2d 212.

It is our opinion that the present case presents a classic example of the type of situation for which the interpleader statute was designed, where a request of a deposit of a fund of money would prevent just relief. *Edner* v. *Massachusetts Mutual Life Insurance Company* (CA 3, 1943), 138 F.2d 327.

28 U.S.C.A. 1335 provides:

"1335. Interpleader. (a) *The district courts shall have original jurisdiction of any civil action* of interpleader or *in the nature of interpleader filed by any person,* firm, or corporation, association, or society *having in his or its custody or possession money or property of the value of $500 or more,* or having issued, a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, *or being under any obligation written or unwritten to the amount of $500 or more,* if

"(1) *Two or more adverse claimants, of diverse citizenship as defined in Section 1332 of this title, or claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note,* bond, certificate, policy *or other instrument, or arising by virtue of any such obligation;* and if (2) *the plaintiff has deposited such money or property* or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, *or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plain-*

tiff with the future order or judgment of the court with respect to the subject matter of the controversy.

"(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931." (Emphasis supplied).

We would also point out that Rule 22 of the Rules of Civil Procedure provides as follows:

"Rule 22. Interpleader. (1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

"(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. As amended Dec. 29, 1948, eff. Oct. 20, 1949."

28 U.S.C.A. 1397 referred to in the above Rule permits a civil action of interpleader or in the nature of interpleader under Section 1335 to be brought in the judicial district where one or more of the claimants reside and

28 U.S.C.A. 2361 provides for the process and procedure under the interpleader statute.

It is at least clear to us that the interpleader statute providing as it does for the jurisdiction of the United States District Courts with property in the value of $500.00 or more and obligations written or unwritten in the amount of $500.00 or more and providing for the giving of a bond in lieu of the making of a deposit, that the giving of a bond once made and pursuant to statute meets the requirements of the law conferring the jurisdiction of the court over the subject matter in controversy. See *Gannon* v. *American Airlines, supra.*

We believe that *Gannon* holds that a bond which is conditioned upon plaintiffs' compliance with the future order or judgment of the court with respect to the subject matter of the controversy in excess of $500.00, meets the requirement of the statute unless there is an abuse of judicial discretion. Thus it is by virtue of the bond and not by reason of depositing any fund of money that this court has jurisdiction over the subject matter of the present controversy. Stated another way it is our opinion that the deposit of a bond in an interpleader action is not a constructive placing of the actual subject of the controversy in this court. The deposit of the fund on the one hand and of a bond on the other are alternative provisions for the resolution of a controversy, and are defined for two entirely different purposes. The former assures to the victorious plaintiff claiming a sum certain that he will actually have a sum to take possession of upon the termination of the lawsuit or that the defendants may divide this sum certain in accordance with the judgment of the court. The latter assures that the plaintiff will comply with the future orders and judgment of the court and is to be fixed in an amount which the court deems adequate. We note that if the contention of the defendants was correct, the bond, for instance, involving sales to Helex might well be in excess of $198,000,000.00. Such a

construction would defeat, not only plaintiffs' remedy but indeed might well defeat the purposes of the Helium Act referred to above. This disposes of the first two grounds by which defendants sought to sustain their motions because we hold that under the facts before us the bonds filed by Cities Service and the other plaintiffs have vested jurisdiction of the subject matter of this controversy in this court.

The facts recited above disclose that there is certainly a controversy amongst the land owners, the producers and the extractors with respect to the ownership of the helium content of the gas which is presently being sold to the Federal Government, and indeed, there is a controversy as to who is entitled to the proceeds received from the helium and in what amount.

The fourth contention is that all persons who may have or claim an adverse interest are indispensable parties and must be made parties defendant and service obtained on them. We do not consider that this prevents the court from exercising jurisdiction of this case at this time in its present posture. In *Maryland Casualty Company* v. *Glassell-Taylor and Robinson, et al,* 156 F.2d 519, the court said:

> "The absence of parties who are not indispensable, but who ought to be brought before the Court, is not, under Rule 19(b) of the Federal Rules of Civil Procedure, grounds for dismissing the complaint when the bringing in of such parties will not defeat jurisdiction in the case. Moreover, if the bond is not a statutory bond, but is only the conventional bond of a subcontractor given to the general contractor as obligee, as appears from the contract and the allegations of the complaint, which we must take as true, the owner would be neither an indispensable, nor a necessary, party in a suit relating to the bond. The fact that the owner of the housing project is not made a party, and therefore, will not be estopped by the decree from

later making a claim against the plaintiff, will in no wise prevent the Court from adjudicating the rights of those who come in and set up their claims. The Interpleader Act does not require, nor seem to contemplate, that one should be brought in as a claimant who is not, in fact, a claimant." (Emphasis supplied).

The fifth contention that this court is not under any duty to exercise jurisdiction in this case appears to us to be ill founded. The common subject matter of this action, namely the claim of ownership under the mineral leases of the helium produced and marketed, is of important public interest, the diversity of state citizenship of the various parties to the action, all indicate to this court that the federal court is the proper forum where the dispute of these parties may be received.

The sixth and last ground raised particularly by the land owners that plaintiffs do not come into court with clean hands because they are not depositing $11.78 per m.c.f. of helium, but instead, are depositing only 12 cents per m.c.f. is a question of fact which must be determined by the court. Indeed, this claim to the proceeds of the helium is the essence of the land owners claim for recovery measured in dollars. At this stage of the proceedings, however, the question of the adequacy of the bond which we hold gave this court its jurisdiction to determine the rights of the parties with respect to the subject matter of this action, and to which the defendants are asserting or may assert a claim, does not condemn the plaintiffs for their failure to do equity.

The Court concludes that it has jurisdiction and that the motions attacking that jurisdiction will be denied in accordance with our letter of September 9, 1963.

At Wichita, Kansas this 13th day of September, 1963.

(Signed) WESLEY E. BROWN
United States District Judge

APPENDIX F

Judgment of the Court of Appeals for the Tenth Circuit Entered March 2, 1971

JANUARY TERM - MARCH 2, 1971

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth, and Honorable Robert H. McWilliams, *Circuit Judges.*

307-69, 308-69, 309-69, 310-69,
311-69, 312-69, 313-69, 314-69,
315-69, 316-69, 317-69, 318-69,
319-69, 320-69, 321-69, 322-69,
361-69, 362-69, 363-69, 364-69,
365-69, 366-69, 367-69, 368-69,
369-69, 370-69, 371-69, 372-69,
373-69, 374-69, 375-69, 376-69,
377-69, 378-69, 379-69, 380-69,
381-69, 382-69, 383-69, 384-69,
385-69, 386-69, 387-69, 388-69,
389-69, 390-69, 391-69, 392-69,
393-69, 394-69, 395-69, 396-69,
397-69, 398-69, 399-69, 400-69,
401-69, 402-69, 486-69, 487-69,
488-69, 489-69, 490-69, 491-69,
492-69, 493-69, 494-69, 495-69,
496-69, 497-69, 498-69, 499-69,
500-69, 501-69, 502-69, 503-69,
504-69, 505-69, 506-69, 507-69,
508-69, 509-69, 510-69, 511-69,
512-69, 513-69, 514-69, 515-69.

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

The caption to the above-numbered causes was adopted in a court-approved stipulation. These eighty-eight (88) cases came on to be heard from a judgment entered in eight (8) consolidated civil actions, all filed in, or transferred to, the United States District Court for the District of Kansas. They were argued by counsel to the Court for two (2) days.

On consideration whereof, it is ordered that the judgment of said United States District Court for the District of Kansas is severally affirmed in the above actions Nos. 367-69, 368-69, 375-69, 376-69, 383-69, 384-69, 393-69, 394-69, 401-69, 402-69, 490-69, 491-69, 498-69 and 499-69.

Upon consideration of the remainder of the actions, namely, Nos. 307-69, 308-69, 309-69, 310-69, 311-69, 312-69, 313-69, 314-69, 315-69, 316-69, 317-69, 318-69, 319-69, 320-69, 321-69, 3[illegible]-69, 361-69, 362-69, 363-69, 364-69, 365-69, 366-69, 369-69, 370-69, 371-69, 372-69, 373-69, 374-69, 377-69, 378-69, 379-69, 380,69, 381-69, 382-69, 385-69, 386-69, 387-69, 388-69, 389-69, 390-69, 391-69, 392-69, 395-69, 396-69, 397-69, 398-69, 399-69, 400-69, 486-69, 487-69, 488-69, 489-69, 492-69, 493-69, 494-69, 495-69, 496-69, 497-69, 500-69, 501-69, 502-69, 503-69,

504-69, 505-69, 506-69, 507-69, 508-69, 509-69, 510-69, 511-69, 512-69, 513-69, 514-69, and 515-69, it is ordered that the judgments of said Court are severally reversed and the cases are remanded to the said District Court for further proceedings, in conformity with the opinion.

It is further ordered that, within fourteen (14) days from March 2, 1971, or such further time as the Court may allow, the parties shall present their itemized and verified Bills of Costs, if any, and whatever statements that they may care to make in regard to the division and assessments of costs. The assessment of costs is to be the subject of future action by this Court.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips,
Clerk.

APPENDIX G

Order of United States Court of Appeals for the Tenth Circuit Enlarging the Time for Filing a Petition for Rehearing Until April 15, 1971, Entered March 9, 1971

MARCH TERM - MARCH 9, 1971

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth, and Honorable Robert H. McWilliams, *Circuit Judges.*

307-69, 308-69, 309-69, 310-69,
311-69, 312-69, 313-69, 314-69,
315-69, 316-69, 317-69, 318-69,
319-69, 320-69, 321-69, 322-69,
361-69, 362-69, 363-69, 364-69,
365-69, 366-69, 367-69, 368-69,
369-69, 370-69, 371-69, 372-69,
373-69, 374-69, 375-69, 376-69,
377-69, 378-69, 379-69, 380-69,
381-69, 382-69, 383-69, 384-69,
385-69, 386-69, 387-69, 388-69,
389-69, 390-69, 391-69, 392-69,
393-69, 394-69, 395-69, 396-69,
397-69, 398-69, 399-69, 400-69,
401-69, 402-69, 486-69, 487-69,
488-69, 489-69, 490-69, 491-69,
492-69, 493-69, 494-69, 495-69,
496-69, 497-69, 498-69, 499-69,
500-69, 501-69, 502-69, 503-69,
504-69, 505-69, 506-69, 507-69,
508-69, 509-69, 510-69, 511-69,
512-69, 513-69, 514-69, 515-69.

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

Upon consideration of the motion filed by "Helex Group" for the following orders: (1) for an order enlarging the time for filing a Petition for Rehearing until April 15, 1971; (2) for an order enlarging the time for presenting itemized and verified Bills of Costs until fourteen (14) days from final disposition of the Petition for Rehearing; and (3) for an order granting permission to exceed fifteen (15) pages of printing in presenting the Petition for Rehearing, the motions are hereby severally granted.

It is further ordered by the Court that the size of the Petition for Rehearing to be filed pursuant to the foregoing order shall not exceed thirty-five (35) pages of printing in length.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips,
Clerk.

APPENDIX H

Order of United States Court of Appeals for the Tenth Circuit Denying Petitions for Rehearing. Dated May 20, 1971

MAY TERM - MAY 20, 1971

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth, and Honorable Robert H. McWilliams, *Circuit Judges.*

307-69, 308-69, 309-69, 310-69,
311-69, 312-69, 313-69, 314-69,
315-69, 316-69, 317-69, 318-69,
319-69, 320-69, 321-69, 322-69,
361-69, 362-69, 363-69, 364-69,
365-69, 366-69, 367-69, 368-69,
369-69, 370-69, 371-69, 372-69,
373-69, 374-69, 375-69, 376-69,
377-69, 378-69, 379-69, 380-69,
381-69, 382-69, 383-69, 384-69,
385-69, 386-69, 387-69, 388-69,
389-69, 390-69, 391-69, 392-69,
393-69, 394-69, 395-69, 396-69,
397-69, 398-69, 399-69, 400-69,
401-69, 402-69, 486-69, 487-69,
488-69, 489-69, 490-69, 491-69,
492-69, 493-69, 494-69, 495-69,
496-69, 497-69, 498-69, 499-69,
500-69, 501-69, 502-69, 503-69,
504-69, 505-69, 506-69, 507-69,
508-69, 509-69, 510-69, 511-69,
512-69, 513-69, 514-69, 515-69.

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

Upon consideration of the petitions for rehearing heretofore filed by the parties hereto, it is ordered that such petitions are denied.

The costs will be considered by this Court at a later date.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips,
Clerk.

APPENDIX I

Order of United States Court of Appeals for the Tenth Circuit Denying Motion Containing Suggestions for Rehearing in Banc, Dated May 20, 1971

MAY TERM - MAY 20, 1971

Before Honorable David T. Lewis, *Chief Judge,* Honorable Jean S. Breitenstein, *Senior Judge,* and Honorable Delmas C. Hill, Honorable Oliver Seth and Honorable Robert H. McWilliams, *Circuit Judges.*

The Honorable William J. Holloway, Jr. disqualified himself and did not act on the motion. The Honorable James E. Barrett and the Honorable William E. Doyle did not participate.

307-69, 308-69, 309-69, 310-69,
311-69, 312-69, 313-69, 314-69,
315-69, 316-69, 317-69, 318-69,
319-69, 320-69, 321-69, 322-69,
361-69, 362-69, 363-69, 364-69,
365-69, 366-69, 367-69, 368-69,
369-69, 370-69, 371-69, 372-69,
373-69, 374-69, 375-69, 376-69,
377-69, 378-69, 379-69, 380-69,
381-69, 382-69, 383-69, 384-69,
385-69, 386-69, 387-69, 388-69,
389-69, 390-69, 391-69, 392-69,
393-69, 394-69, 395-69, 396-69,
397-69, 398-69, 399-69, 400-69,
401-69, 402-69, 486-69, 487-69,
488-69, 489-69, 490-69, 491-69,
492-69, 493-69, 494-69, 495-69,
496-69, 497-69, 498-69, 499-69,
500-69, 501-69, 502-69, 503-69,
504-69, 505-69, 506-69, 507-69,
508-69, 509-69, 510-69, 511-69,
512-69, 513-69, 514-69, 515-69.

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

Upon consideration of the motion of the Helex Group containing suggestion for rehearing of the captioned cases en banc, it is ordered that the motion is denied.

The costs will be considered by this Court at a later date.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips,
Clerk.

APPENDIX J

Order of United States Court of Appeals for the Tenth Circuit Denying Motion by Respondent Landowners for Time To File Petition for Rehearing Out of Time, Dated June 9, 1971

MAY TERM - JUNE 9, 1971

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth, and Honorable Robert H. McWilliams, *Circuit Judges.*

307-69, 308-69, 309-69, 310-69,
311-69, 312-69, 313-69, 314-69,
315-69, 316-69, 317-69, 318-69,
319-69, 320-69, 321-69, 322-69,
361-69, 362-69, 363-69, 364-69,
365-69, 366-69, 367-69, 368-69,
369-69, 370-69, 371-69, 372-69,
373-69, 374-69, 375-69, 376-69,
377-69, 378-69, 379-69, 380-69,
381-69, 382-69, 383-69, 384-69,
385-69, 386-69, 387-69, 388-69,
389-69, 390-69, 391-69, 392-69,
393-69, 394-69, 395-69, 396-69,
397-69, 398-69, 399-69, 400-69,
401-69, 402-69, 486-69, 487-69,
488-69, 489-69, 490-69, 491-69,
492-69, 493-69, 494-69, 495-69,
496-69, 497-69, 498-69, 499-69,
500-69, 501-69, 502-69, 503-69,
504-69, 505-69, 506-69, 507-69,
508-69, 509-69, 510-69, 511-69,
512-69, 513-69, 514-69, 515-69.

(Consolidated Helium Cases)

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),
Appellees and Cross-Appellants,

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees,

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees.

These cases are before the court on various motions which are severally disposed of herein.

1—*Motion of landowners for leave to file a petition for rehearing out of time.*

This motion was filed on June 8, 1971. Judgment was entered in all cases on March 2, 1971. An order was made on March 11, 1971, extending the time for petitions for rehearing to April 15, 1971. The court notes that the motion refers only to case No. 311-69 and does not use the caption approved by the court's September 10, 1969, order directing procedure. If the intent is to have the motion apply to all of the appeals, it is denied because it is untimely under Rule 40(a), F.R.A.P. If the intent is to have the motion apply only to case No. 311-69, it is denied for the same reason.

2—*Costs*

The March 11, 1971, order of the court enlarged the time for presenting bills of costs until 14 days after final disposition of petitions for rehearing. All timely petitions for rehearing were denied on May 20, 1971. On May 27, 1971, the court entered an order for allocation of costs. That order was premature and was entered through inadvert-

ence and oversight in that the time permitted by the March 11, 1971, order had not expired.

It is accordingly ordered that the May 27, 1971, order allocating and fixing costs is vacated and held for naught.

It is further ordered that all questions pertaining to costs in the court of appeals shall be held in abeyance until the further order of the court made after notice to all parties and an opportunity for all parties to be heard.

3—*Stay of mandate.*

The members of the Helex group have announced their intention to file petitions for certiorari in the Supreme Court of the United States in all 88 of the appeals disposed of by the judgments entered on March 2, 1971, and have moved for a stay of mandate in each case. The court believes that no need exists for 88 petitions for certiorari but, absent some agreement by the parties, it concludes that at the present stage of the proceedings there is nothing which it can do.

It is ordered that the mandate in each case is stayed until July 15, 1971. On or before June 28, 1971, the Helex group shall file one bond in the sum of $100,000 with corporate surety and serve copies thereof on the attorneys of record for the adverse parties. The conditions of the bond shall be those stated in 28 U.S.C. § 2101(f). The bond shall be for the benefit of all adverse parties in all 88 cases. The adverse parties shall have until July 6, 1971, to file whatever objections they may have to the bond. If the bond is approved by the court, the mandates in all cases shall be stayed until August 18, 1971, and in the event that on or before that date petitions for certiorari are filed in all cases in the Supreme Court of the United States, the stay shall continue until the final disposition of the cases in the Supreme Court of the United States.

/s/ Howard K. Phillips
Howard K. Phillips,
Clerk.

APPENDIX K

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment to the Constitution of the United States

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. § 1(b) of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. § 717(b)

NATURAL GAS ACT

(15 U.S.C. § 717 et al)

Section 1 (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717 (b)]

§ 4(c) of the Natural Gas Act, 52 Stat. 822, 15 U.S.C. § 717(c)

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in con-

venient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

3. Helium Act Amendments of 1960 74 Stat. 918, 50 U.S.C. § 167-167n

Public Law 86-777

AN ACT

To amend the Helium Act of March 3, 1925, as amended, for the defense, security, and the general welfare of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Helium Act Amendments of 1960."

SEC. 2. The Act entitled "An Act authorizing the conservation, production, and exploitation of helium gas, a mineral resource pertaining to the national defense, and to the development of commercial aeronautics, and for other purposes", approved March 3, 1925 (43 Stat. 1110), as amended, is amended to read as follows:

"That this Act may be cited as the 'Helium Act'.

"SEC. 2. As used in this Act:

"(1) The term 'Secretary' means the Secretary of the Interior;

"(2) The term 'person' means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, or State or political subdivision thereof; and

"(3) The terms 'helium-bearing natural gas' and 'helium-gas mixture' mean, respectively, natural gas and

gas mixtures containing three-tenths of 1 per centum or more of helium by volume.

"SEC. 3. (a) For the purpose of conserving, producing, buying, and selling helium, the Secretary is authorized—

"(1) to acquire by purchase, lease, gift, exchange, or eminent domain, lands or interests therein or options thereon, including but not limited to sites, rights-of-way, and oil or gas leases containing obligations to pay rental in advance or damages arising out of the use and operation of such properties; but any such land or interest in lands may be acquired by eminent domain only when the Secretary determines (A) that he is unable to make a satisfactory agreement to acquire such land or interest in land, and (B) that such acquisition by eminent domain is necessary in the national interest;

"(2) to make just and reasonable contracts and agreements for the acquisition, processing, transportation, or conservation of helium, helium-bearing natural gas, or helium-gas mixtures upon such terms and conditions, and for such periods, not exceeding twenty-five years, as may be necessary to accomplish the purposes of the Act, except that the Secretary shall not make such contracts and agreements which shall require payments by the Government in any one fiscal year aggregating more than the amount which shall be established initially in an appropriation Act and which may be increased from time to time in appropriation Acts, or if the Secretary—

"(A) determines that the national interests require the conservation of certain helium or require certain helium-bearing natural gas or certain helium-gas mixture for the production or conservation of helium, and

"(B) determines that he is unable to acquire such helium, helium-bearing natural gas, or helium-gas

mixture upon reasonable terms and at the fair market value,

he is authorized to acquire by eminent domain such helium and so much of such helium-bearing natural gas or helium-gas mixture as is necessarily consumed in the extraction of such helium after removal from its place of deposit in nature and wherever found, or the temporary use of such helium-bearing natural gas or helium-gas mixture for the purpose of extracting helium, together with the appropriate interest in pipelines, equipment, installations, facilities, personal or real property, including reserves, easements or other rights necessary or incident to the acquisition of such helium, natural gas, or mixture, but the condemnation of any such helium, helium-bearing natural gas, or helium-gas mixture, shall be effected in the same manner and following the procedures established in section 8(a) of this Act, the just compensation for such condemnation to be measured by terms and prices determined to be commensurate with the fair market value, and in the temporary use of any helium-bearing natural gas or helium-gas mixture for the purpose of extracting helium the Secretary shall cause no delay in the delivery of natural gas to the owner, purchaser, or purchasers thereof, except that required by the extractive processes;

"(3) to construct or acquire by purchase, lease, exchange, gift or eminent domain, plants, wells, pipelines, compressor stations, camp buildings, and other facilities, for the production, storage, purification, transportation, purchase, and sale of helium, helium-bearing natural gas, and helium-gas mixtures: and to acquire patents or rights therein and reports of experimentation and research used in connection with the properties acquired or useful in the Government's helium operations;

"(4) to dispose of, by lease or sale, property, including wells, lands, or interests therein, not valuable for helium production, and oil, gas, and byproducts, of helium operations not needed for Government use, except that property determined by the Secretary to be 'excess' within the meaning of section 3(e) of the Federal Property and Administrative Services Act of June 30, 1949 (60 Stat. 378; 40 U.S.C. 472(e)), as amended, shall be disposed of in accordance with the provisions of that Act; and to issue leases to the surface of lands or structures thereon for grazing or other purposes when the same may be done without interfering with the production of helium; and

"(5) to accept equipment, money, and other contributions from public and private sources and to prosecute projects in cooperation with other agencies, Federal, State, or private.

"(b) Any known helium-gas-bearing land on the public domain not covered at the time by leases or permits under the Mineral Lands Leasing Act of February 25, 1920, as amended, may be reserved for the purposes of this Act, and any reservation of the ownership of helium may include the right to extract, or have extracted, such helium, under such rules and regulations as may be prescribed by the Secretary, from all gas produced from lands so permitted, leased, or otherwise granted for development, except that in the extraction of helium from gas produced from such lands, it shall be extracted so as to cause no delay, except that required by the extraction process, in the delivery of gas produced from the well to the purchaser or purchasers thereof at the point of delivery specified in contracts for the purchase of such gas. If any reserved rights of ownership and extraction of helium are not exercised before production of any helium-bearing natural gas or any helium-gas mixture, the Secretary is authorized to acquire such helium in accordance with section 3(a)(2) of this Act.

"(c) All contracts and agreements made by the Secretary for the acquisition of helium from a private plant shall contain a provision precluding the plant owner from selling any helium to any purchaser other than the Secretary at a price lower than the lowest price paid by any Government agency for helium acquired from any private plant under any contract entered into pursuant to this section and outstanding at the time of such sale.

"Sec. 4. The Secretary is authorized to maintain and operate helium production and purification plants together with facilities and accessories thereto; to acquire, store, transport, sell, and conserve helium, helium-bearing natural gas, and helium-gas mixtures, to conduct exploration for and production of helium on and from the lands acquired, leased, or reserved; and to conduct or contract with public or private parties for experimentation and research to discover helium supplies and to improve processes and methods of helium production, purification, transportation, liquefaction, storage, and utilization: *Provided, however,* That all research contracted for, sponsored, cosponsored, or authorized under authority of this Act shall be provided for in such a manner that all information, uses, products, processes, patents and other developments resulting from such research developed by Government expenditure will (with such exceptions and limitations, if any, as the Secretary may find to be necessary in the interest of national defense) be available to the general public: *And provided further,* That nothing contained herein shall be construed as to deprive the owner of any background patent relating thereto to such rights as he may have thereunder.

"Sec. 5 (a) Whenever the President determines that the defense security, and general welfare of the United States requires such action, the Secretary shall issue such regulations as he deems necessary for the licensing of sales and transportation of helium in interstate commerce after extraction from helium-bearing natural gas or helium-gas mixtures. Thereafter it shall be unlawful for any person

to sell or transfer helium in interstate commerce except in accordance with such regulations or pursuant to the terms of a license issued by the Secretary, or in accordance with the terms of a contract or agreement with the Secretary entered into pursuant to this Act. For the purpose of this section, the term 'helium' shall mean helium, after extraction from helium-bearing natural gas or helium-gas mixtures, in a refined or semirefined state suitable for use.

"(b) Each license shall be issued for a specified period to be determined by the Secretary, but not exceeding five years, and may be renewed by the Secretary upon the expiration of such period. No such license shall be issued to a person if in the opinion of the Secretary the issuance of a license to such person would be inimical to the defense and security of the United States. No such license shall be assigned or otherwise transferred directly or indirectly except with the consent or approval of the Secretary in writing. Any such license may be revoked for any material false statement in the application for license, or for violation or a failure to comply with the terms and provisions of this Act, the regulations issued by the Secretary pursuant thereto, or the terms of the license.

"(c) In issuing licenses under this section, the Secretary shall impose such regulations and terms of licenses as will permit him effectively to promote the common defense and security as well as the general welfare of the United States. The licensing authority herein granted shall be used solely for the purpose of preventing the transportation or sale of helium for end uses determined by the Secretary to be nonessential or wasteful, and any determination that any end use is nonessential or wasteful shall be published in the form of general regulations applicable to all transportation or sales of helium.

"(d) Whenever Congress or the President declares that a war or national emergency exists, the Secretary is authorized to suspend any license granted under this Act if

in his judgment such suspension is necessary to the defense and security of the United States, and he is further authorized to take such steps as may be necessary to recapture or reacquire supplies of helium.

"SEC. 6. (a) The Department of Defense, the Atomic Energy Commission, and other agencies of the Federal Government, to the extent that supplies are readily available, shall purchase all major requirements of helium from the Secretary.

"(b) The Secretary is authorized to sell helium for Federal, medical, scientific, and commercial uses in such quantities and under such terms and conditions as he determines.

"(c) Sales of helium by the Secretary shall be at prices established by him which shall be adequate to cover all costs incurred in carrying out the provisions of this Act and to repay to the United States by deposit in the Treasury, together with interest as provided in subsection (d) of this section, the following:

"(1) Within twenty-five years from the date of enactment of the Helium Act Amendments of 1960, the net capital and retained earnings of the helium production fund (established under section 3 of this Act prior to amendment by the Helium Act Amendments of 1960), determined by the Secretary as of such date of enactment, plus any moneys expended thereafter by the Department of the Interior from funds provided in the Supplemental Appropriation Act, 1959, for construction of a helium plant at Keyes, Oklahoma;

"(2) Within twenty-five years from the date of borrowing, all funds borrowed, as provided in section 12 of this Act, to acquire and construct helium plants and facilities; and

"(3) Within twenty-five years from the date of enactment of the Helium Act Amendments of 1960, unless the Secretary determines that said period should

be extended for not more than ten years, all funds borrowed, as provided in section 12 of this Act, for all purposes other than those specified in clause (2) above.

"(d) Compound interest on the amount specified in clauses (1), (2), and (3) of subsection (c) which have not been paid to the Treasury shall be calculated annually at rates determined by the Secretary of the Treasury taking into consideration the current average market yields of outstanding marketable obligations of the United States having maturities comparable to the investments authorized by this Act, except that the interest rate on the amounts specified in clause (1) of subsection (c) shall be determined as of the date of enactment of the Helium Act Amendments of 1960, and the interest rate on the obligations specified in clauses (2) and (3) of subsection (c) as of the time of each borrowing.

"(e) Helium shall be sold for medical purposes at prices which will permit its general use therefor; and all sales of helium to non-Federal purchasers shall be upon condition that the Federal Government shall have a right to repurchase helium so sold that has not been lost or dissipated, when needed for Government use, under terms and at prices established by regulations.

"(f) All moneys received under this Act, including moneys from sale of helium or other products resulting from helium operations and from the sale of excess property shall be credited to the helium production fund, which shall be available without fiscal year limitation, for carrying out the provisions of this Act, including any research relating to helium carried out by the Department of the Interior. Amounts accumulating in said fund in excess of amounts the Secretary deems necessary to carry out this Act and contracts negotiated hereunder shall be paid to the Treasury and credited against the amounts required to be repaid to the Treasury under subsection (c) of this section.

"SEC. 7. The Secretary of Defense and the Chairman of the Atomic Energy Commission may each designate representatives to cooperate with the Secretary in carrying out the purposes of this Act, and shall have complete right of access to plants, data, and accounts.

"SEC. 8. (a) Proceedings for the condemnation of any property under section 3 of this Act shall be instituted and maintained pursuant to the provisions of the Act of August 1, 1888 (25 Stat. 357; 40 U.S.C. 257), as amended, and sections 1358 and 1403 of title 28 of the United States Code, or any other Federal statute applicable to the acquisition of real property by eminent domain. The Acts of February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258a-258e), and October 21, 1942 (56 Stat. 797; 40 U.S.C. 258f), shall be applicable to any such proceedings. Wherever the words 'real property', 'realty', 'land', 'easement', 'right-of-way', or words of similar meaning, are used in such code provisions or Acts relating to procedure, jurisdiction, and venue, they shall be deemed, for the purposes of this Act, to include any personal property authorized to be acquired hereunder.

"(b) In the event of disposal under section 3(a)(4) of this Act of any property acquired by eminent domain pursuant to this Act, the former owner or successor interest of the rights therein shall have the preferential right to reacquire such property on terms as favorable as those terms whereby disposition may be made under such section.

"SEC. 9. The Secretary is hereby authorized to establish and promulgate such rules and regulations, as are consistent with the directions of this Act and are necessary to carry out the provisions hereof.

"SEC. 10. (a) The provisions of the Administrative Procedure Act of June 11, 1946 (60 Stat. 637; 5 U.S.C. 1001-1011), as amended, shall apply to any agency proceeding and any agency action taken under this Act, including the issuance of rules and regulations, and the

terms 'agency proceeding' and 'agency action' shall have the meaning specified in the Administrative Procedure Act.

"(b) In any proceeding under this Act for the granting, suspending, revoking, or amending of any license, or application to transfer control thereof, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, the Secretary shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. Any final order entered in any such proceedings shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950 (64 Stat. 1129; 5 U.S.C. 1031-1042), as amended, and to the provisions of section 10 of the Administrative Procedure Act.

"SEC. 11. The provisions of the Natural Gas Act of June 21, 1938 (52 Stat. 821; 15 U.S.C. 717-717w), as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 4 and 5 of the Natural Gas Act, as amended, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.

"SEC. 12. (a) The Secretary is authorized to borrow annually from the Treasury and credit to the fund established under section 6(f) of this Act such amounts as may

be authorized in the initial appropriation Act and which may be increased from time to time in appropriation Acts and as are necessary to carry out the provisions of this Act and contractual obligations hereunder.

"(b) For the purpose of this section the Secretary may issue to the Secretary of the Treasury notes, debentures, bonds, or other obligations to be redeemable at the option of the Secretary before maturity in such manner as may be stipulated in such obligations. The Secretary of the Treasury is authorized and directed to purchase any obligations issued by the Secretary under authority of this section and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under the Second Liberty Bond Act, as amended, are extended to include any purchases of obligations of the Secretary hereunder.

"SEC. 13. Whoever willfully violates, attempts to violate, or conspires to violate, any provision of this Act or any regulation or order issued or any terms of a license granted thereunder shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both, except that whoever commits such an offense with intent to injure the United States or with intent to secure an advantage to any foreign nation, shall upon conviction thereof, be punished by a fine of not more than $20,000 or by imprisonment for not more than twenty years, or both.

"SEC. 14. Whenever in the judgment of the Secretary any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this Act, or any regulation or order issued or any term of a license granted thereunder, any such act or practice may be enjoined by any district court having jurisdiction of such person, and proper proceedings to this

end may be instituted under the direction of the Attorney General of the United States.

"SEC. 15. It is the sense of the Congress that it is in the national interest to foster and encourage individual enterprise in the development and distribution of supplies of helium, and at the same time provide, within economic limits, through the administration of this Act, a sustained supply of helium which, together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Governmental activities.

"SEC. 16. The Secretary of the Interior is directed to report annually to the Congress on matters contained in this Act.

"SEC. 17. If any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

SEC. 3. The amendment made by this Act shall become effective on March 1, 1961.

Approved September 13, 1960.

4. Federal Interpleader Statute, 62 Stat. 931, 28 U.S.C. § 1335

§ 1335. INTERPLEADER

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, c. 646, 62 Stat. 931.

5. Rule 54 of Federal Rules of Civil Procedure

54(d) provides:

> "(d) *Costs.* Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court. As amended Dec. 27, 1946, eff. March 19, 1948; Apr. 17, 1961, eff. July 19, 1961." (Emphasis supplied)

6. Costs in Federal Court Actions, 62 Stat. 955, 28 U.S.C. § 1920

§ 1920. TAXATION OF COSTS

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955.

7. Costs, United States as Party, 62 Stat. 973, 28 U.S.C. § 2412 (1948)

§ 2412. Costs

(a) The United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress.

(b) In an action under subsection (a) of section 1346 or section 1491 of this title, if the United States puts in issue plaintiff's right to recover, the district court or Court of Claims may allow costs to the prevailing party from the time of joining such issue. Such costs shall include only those actually incurred for witnesses and fees paid to the clerk.

(c) In an action under subsection (b) of section 1346 of this title, costs shall be allowed in all courts to the successful claimant, but such costs shall not include attorneys' fees. June 25, 1948, c. 646, 62 Stat. 973.

Respondent Landowners Named

RALPH GROUNDS
HENRY HITCH, JR.
CLAUDE ADAMS
ELMER ADAMS
MIKE J. ALBERT
ALFRED M. AKIN
FRANK J. ASHBROOK
CLYDE ADAMS
FRANCES APPLEGET
HEIRS,
FRANK APPELGATE, Agent
REAVLES L. ARNOLD
OSTBY S. AUSTIN
ELANE E. ALBRIGHT
A. E. ALEXANDER
KATHERINE R. ADAMS
PAUL R. BROWN
ARVEL BARNES
E. M. BOWLES
T. J. BAKER
L. H. BRILES
IRENE BOWLES ESTATE,
E. M. BOWLES, Executor
HARRY A. BATHURST
GRANT BLAUSER
DESSIE CAPP BAKER,
Administratrix of the
J. C. CAPP ESTATE
OTTO R. BYERLEY
FLOYD O. and
HELEN J. BOWMAN
DORIS (or LOUIS) BARBY
LULA M. BAGGERLY
MAX BAGGERLY
JERRY BAGGERLY
PEARL (nee Thompson)
BAKER
ORVILLE BELILE
CLARENCE O. BARE
L. MYRTLE BOGART
C. W. BALL
DALLAS E. BARNUM
PETER BALZER
by M. A. HERMS, GUARDIAN
MARGUERITE BLISS
EFFIE BARKER
VERBEL E. BURNS
EUSEBA S. BAIRD
BLOYD BURGESS
JOHN A. BLUE, M.D.
MARY E. BOOTH
FRED BALLARD
JAMES BITNER
ALBERT BARBY
RALPH E. BARBY
RUSSELL BARBY
ALFRED BARBY
LORETTA BLASCO,
Administratrix
J. P. CAMBY, M.D.
D. R. COMPTON
JOHN J. CECIL
L. F. CRITES
MAMIE CLINKINGBEARD
GERTRUDE E. CRAIG,
Administratrix of Estate of
EARL A. CRAIG, Deceased
DILLARD CRAWFORD
EDNA CARPENTER
L. F. CRITES and
BEULAH I. CRITES
BEULAH L. CRUDYINGTON
AVA L. CRAWFORD and
DOROTHY L. DICK
EDITH COLLINS
MRS. BESSIE CARSCALLEN
C. S. CLAYTON
JACK H. and
MAYEBELLE CHENNELL
HAZEL E. CHAMBERS
DOROTHY M. COX
JAY WILSON CUMMINGS

SHIRLEY BARNES CROW,
Heir to CULLEN BARNES
GEORGE A. and
DICIE CRANE
EDNA CARROLL
PAUL A. CUSTER
OSCAR CORNELIUS
MARY L. CHAPMAN
MRS. CECILE BUENZ
ROSCOE BLAUZER
ROY E. BUCK
ERMINE DIMITT
W. B. DERRYBERRY
C. M. DEPUY
ADELLE DAVIS
CECIL L. and
ELIZABETH B. DUER
ANNA DEBNER
C. DABE DUER
HELEN L. DOHERTY
MRS. ANNA DUNHAM
MARY JO DIMBAT, Executrix
of the Estate of
CORA E. EVANS
A. M. and JOSIE DURST
GLENN EASTERWOOD
MRS. G. H. ECKHOFF
MRS. LENA ELLIOTT
HUBERT K. ELROD
WARREN and GLENN
EASTERWOOD and HELEN
EASTERWOOD BOUNDS
PETER ENNS, JR.
COOKE TRUST CO., LTD.,
Administrator of Estate of
WILLIAM ECKSTEIN, Deceased
JOHN and VERNICE
ELDRIDGE
LOLA E. FAURNIGHT
MARY ALE FASSE and
EVA ALE PRITCHETT
HAROLD C. FOWLER
HOWARD J. FIFE
W. H. FULKS
WARREN M. FARRAR
RUTH F. FISCHER
LEON E. FAULEY
J. J. FRENCH
REINHALT C. FISCHER
R. M. FRANKS
E. RUTH FIELDS
ETHEL A. FAUKHOUSER
GEORGE A. FINEFROCK
FRED FLETCHER
IDA B. FARMER
DONALD, NORMAN and
ALLEN FISCHER
HARVEY E. FINFROCK
LOUIS F. FISCHER
GORDON L. GIRCE
JOYCE H. and
JOHN B. GRAY
WINNIFRED GETTO
GRACE GILBERT
DENNIS E. GETZ
JACOB O. GOCHENOUER
L. D. GOOCH, JR.
J. R. GAITHER
J. R. GOODNER
MARION C. GLASKY
ROY L. GREEN
JOSEPH GOODPASTER, SR.
MELVIN GAREY
MELBA GAREY
WM. DeCAMP
RICHARD C. GILCREASE
GENE and FRANCIS
R. GROVE
J. E. GEIST
MOLLIE GALLIART
J. L. GRIMMER ESTATE
L. C. GALE
LEONARD L. GRATH
GEORGE GROTH
EDMOND H. GROTH

MILDRED A. GEIST
MRS. ANNIE GIBLER
MRS. J. F. HAYES
H. S. HAMM
O. R. HEARD
LEE R. HAMMOND
MRS. FRED HODGES
RICHARD HOEME
GARY L. and
MARLIN P. HEGER
J. H. HOFFERBER
O. W. HEGER
EDWIN W. HALVORSON
L. O. HIBBS
J. C. HODGES
ALBERT HODGES
CLAUD HASKELL
LAWTON HARTLEY and
S. M. LADING
WARDEN L. NOE
EDWARD W. HAPPIEST
B. V. HANNA
EDWARD HARLAND
HELEN GREEN HARMAN
MRS. THELMA M. HARPER
LEWIS O. HARRISON
DAISY B. HARRISON
MRS. I. E. HART
JULIA HARVILLE
NINA B. HATCHER
ANNA A. HAYNES
MILDRED LYNCH HELLS
TOM HENDERSON
ADRIAN HICKS
ALMA WRIGHT HINES
W. L. HINSHAW
RICHARD HOEME
MARIA K. HOFFERBER
SPURGEON HELLER
GERTRUDE JENNINGS
R. L. JEWELL
TILGHMAN W. JOHNSON
WILLARD E. JONES
D. RAY JOHNSTON
PEARL N. JULIAN
H. W. JURY
S. G. KANSAS
J. H. KARBER
VIRGIL C. KASER
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MARY KLAPMEYER
MISS MARIE W. E.
KLEEMAN
FERN WRAY KLEIHEGE
ETELKA R. KRIEGER
CLARA D. M. KUHLMAN
N. L. LACEY
CLYDE LAMBERT
PEARL LAZENBY
EARLE L. LEEPER
GEORGE R. LENZ
ARTHUR LIESE
RAY LIGHTY
IDA MILDRED
LILLIBRIDGE and
RUSSELL LEE LILIBRIDGE
MRS. L. KEO LLEWELLYN
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LUTHERAN CHURCH—
MISSOURI SYNOD—
KANSAS DISTRICT
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SIDNEY J. MANNING
GOLDIE SHAW, Agent
ELLA McMANNIS ESTATE
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BETH B. MAHER

IRENE MAPP
LEE ETTA MARTIN
NEVA MARTIN
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NANNIE MAYER
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LILLIE MAE McCREIGHT
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HARRY A. TATUM
MARY TATUM GILLISPIE
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G. C. McCULLEY
MARJORIE McCLAIN
E. E. McDANIEL
PATSY McDANIEL
G. W. McDANIEL
GEORGE T. McDANIEL
HIRAH RALSTIN,
Administrator
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ESTATE
ROBERT F. McFARLAND
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GEO. McGUIRE
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M. T. MECHAN
CARRIE MYERS
EDITH MILES
I. M. MILLER
VEDA L. MILLER
MRS. HATTIE M. MILLER
L. G. MOORE
L. G. MOORE and DELLA M.
DRAKE, joint
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ALONZO MOORE
MINORCEE MOON
ROSS MOSHER, JR.
WILLIAM E. and
ANN MUELLER
H. W. MURDOCK
AGNES G. MURPHY
ROBERT MURPHY
ROY MURPHY
CARL and PAULA NIEDEN
RAND (?) A. NIELSEN
HARVEY MIKKEL
L. BERNICE NILES
C. A. NORDBERG, Trustee of
the Estate of J. P. NORDBERG
D. J. O'CONNOR
E. C. ELLENBURGER
FRED OLSON
FRANCIS W. ORMISTON
MARGUERITE F. O'DEA,
Executor of the Will of
LEAH N. KUTZ
GRACIE A. PACK
ETHYL G. PARKER
JAY A. PARR
HOMER LEROY and
LEONA L. PARSHALL
MARGARET WIEM PAULS
NANCY ..... PEDIGO
R. A. PEEK
H. C. PETROWSKY
NETTIE T. PERKINS
HOMER M. PHILLIPS
MRS. IDA M. PHILLIPPE
RUTH C. PIERCE
(ESTATES)
ELIZABETH K. and
JAMES M. RAY
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MRS. ALENA (LEONARD A.)
PRINGLE

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HILDA SCRANTON
DOTTIE and J. D. SEEGER
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GOLDIE SHAW
ALBERTA N. SHAW
C. M. SHIPTON
MABLE SHAY
MAE D. SHERER
W. A. SHERWOOD
ANNA M. SCHROEDER
ROGER SHAFFER
J. L. SHIVER
MRS. MINNIE SHIVES
O. L. and MARY E. SILER
J. W. SKELLEY
MRS. EARL SMALLEY
EDWARD W. SNOWBARGER and GEO. W. SNOWBARGER, Joint Owner
DANIEL V. SNYDER
MARION R. SOUTHERN
LOLA E. SPAETE
PAUL SPRADLIN
CARL R. STALCUP
DONNA STARKS
KATIE STEVENS by ELMO M. COMPTON, Guardian
FRANCES M. STINCHCOMB
DOROTHY M. STOUT
MARIE D. STROBEL
R. J. STUCKEY
HENRY SUMMERS
W. B. SUMMERS
THOMAS B. (JAKE) SULLIVAN
LINDA SWINGER
MRS. MYRA MAY TAYLOR
BERTHA PERRING TAYLOR (MRS. C. WILLETT TAYLOR)
GLENN TUL
RUSSELL THOMPSON
ALBERT THRALL
HATTIE LOU HOWE, Administratrix CHARLES C. THOMAS ESTATE
NEVA B. TIBBETT
HARRY TIMBERLAKE
PEARL M. TRINKNER
MEL TOWNER
VAN R. TOWNER
GEORGE N. TOWNER
LAWSON TUCKER
FLOYD R. TOWNER
ZELMA STOLTZ TURNER
FLOYD TUTTLE
VELMA J. TWOMBLY nee MRS. O. S. JOHNSON or VELMA JOHNSON
FRED UKENA
JEAN UKENS
WALTER UKENS
EMIL UKENS
MADGE UKENS
A. P. UTKINS (or A. T. ATKINS)
MYRTLE VACHA
CARL D. VAIRD
J. B. VARLES
FRED BEDDER
DEAN TULL

HENRY G. and MARTIN H. VOGT and LENA A. VOGT and KATHERINE VOGT LEACH
BENJAMIN H. and EUNICE M. WAGNER
NINA WALL
ROBERT C. WALLACE
MASON WARNER—VIVIAN WARNER, Attorney in Fact
FRANCES U. C. WARNER
W. J. WEBER
RUSSELL WEEKS
..... V. WEAR
ELMER WAYMEN
C. A. WEBB
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-2381

NORTHERN NATURAL GAS COMPANY, ET AL., *Petitioners*,

v.

MOBIL OIL CORPORATION, ET AL., *Respondents*

and

RALPH GROUNDS, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1971

No.

NORTHERN NATURAL GAS COMPANY, ET AL., *Petitioners,*

v.

MOBIL OIL CORPORATION, ET AL., *Respondents*

and

RALPH GROUNDS, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 2, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, dated March 2, 1971 (Appendix A, infra, p. 1a), is reported at 441 F.2d 704. The opinion of the United States District Court for the District of Kansas, dated September 7, 1968 (Appendix B, infra, p. 39a), is reported at 292 F. Supp. 619. The opinion and order of the District Court determining method and manner for fixing and taxing costs filed June 17, 1969 (Appendix C, infra, p. 171a), is not reported.

The opinion of the Court of Appeals sitting in banc, dated February 11, 1964, affirming jurisdiction of the District Court and affirming orders denying motions for the dissolution of injunctions (Appendix D, infra, p. 178a), is reported at 327 F. 2d 1003. The opinion of the District Court, dated September 13, 1963 (Appendix E, infra, p. 180a), overruling motions to dismiss for lack of jurisdiction and denying motions for the dissolution of injunctions is not reported.

JURISDICTION

The judgments of the Court of Appeals for the Tenth Circuit (Appendix F, infra, p. 199a) were entered on March 2, 1971. Order of the Court of Appeals for the Tenth Circuit enlarging the time of filing a Petition for Rehearing until April 15, 1971, (Appendix G, infra, p. 202a), was entered on March 9, 1971. Timely petitions for rehearing were denied on May 20, 1971, (Appendix H, infra, p. 204a). Motion containing suggestions for rehearing in banc was denied on May 20, 1971, (Appendix I, infra, p. 206a). Motion by respondent landowners for leave to file petition for rehearing out of time was denied on June 9, 1971, (Appendix J, infra, p. 208a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Helium is a mineral resource pertaining to the defense, security, and the general welfare of the United States. The Helium Act Amendments of 1960 define "helium-bearing natural gas" as natural gas containing three-tenths of 1 percentum or more of helium by volume. Independent producers sell helium-bearing natural gas to natural gas pipeline companies in interstate commerce for resale. Subsequent to such sales, the pipeline companies sell the helium constituent to helium extraction companies under separate contracts. The helium extraction companies then extract the helium constituent and sell it to the United States under contracts authorized by the Helium Act Amendments of 1960.

1. Where independent producers sell and deliver helium-bearing natural gas to natural gas pipeline companies under contracts filed with the Federal Power Commission as independent producer gas rate schedules and neither the contracts nor the rate schedules provide for the separate sale or disposition of the helium constituent, and the Court of Appeals held that title to the entire gas stream, including the helium constituent, passed to the pipeline companies under such contracts:

(a) do the provisions of the Natural Gas Act, and hence the gas rate schedules, apply to the sale of the entire stream of helium-bearing natural gas to the pipeline companies, including the helium constituent?

(b) if not, do the provisions of the contracts fixing prices for all volumes of gas so sold and delivered apply to the entire helium-bearing natural gas stream, including the helium constituent?

2. If, as held by the Court of Appeals, the Helium Act Amendments of 1960 make the gas rate schedules

inapplicable and the Natural Gas Act nullifies the pre-existing contractual arrangements between independent producers and pipeline companies fixing prices for all volumes of gas, including the helium constituent, are those two statutes inconsistent with the Due Process clause of the Fifth Amendment to the Constitution of the United States?

3. Does the Federal Power Commission have primary jurisdiction to determine its jurisdiction over sales in interstate commerce of helium-bearing natural gas for resale, and exclusive original jurisdiction to determine whether the circumstances of unequivocal public necessity require the abrogation of contracts governing such sales?

4. In consolidated actions brought under the Tort Claims Act, the Tucker Act and the federal interpleader statute to determine conflicting claims of title to the helium constituent of helium-bearing natural gas sold and delivered by independent producers to natural gas pipeline companies, which helium is subsequently extracted and sold by helium extraction companies to the United States, and the Court of Appeals had determined such title issues in favor of the petitioners and the United States:

(a) absent independent grounds for jurisdiction, whether the Court of Appeals thereafter had interpleader jurisdiction, dehors the issue of title, to entertain respondents' *in personam* claims arising under the Helium Act Amendments of 1960 to be paid the "reasonable value" of such helium constituent over and above the rates fixed or permitted to be paid by the Federal Power Commission for such helium-bearing natural gas?

(b) whether the federal courts have power and discretion in interpleader actions to tax as costs against

the plaintiffs in interpleader the expenses of all claimants, including attorneys' fees, incurred in such actions and in the actions to which the United States was a party?

CONSTITUTIONAL PROVISION, STATUTES, AND RULE OF COURT

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

This case also involves the Natural Gas Act, particularly Sections 1(b) and 4 (c), 52 Stat. 821, 822, 15 U.S.C. § 717(b) and § 717c; the Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C. §§ 167-167n; the federal interpleader statute, 62 Stat. 931, 28 U.S.C. § 1335; Rule 54 of Federal Rules of Civil Procedure; 62 Stat. 955, 28 U.S.C. § 1920 and 62 Stat. 973, 28 U.S.C. § 2412 (1948). These are reprinted in pertinent part in Appendix K, infra, pp. 211a-225a.

STATEMENT UNDER RULE 33(2)(b)

Since the proceeding draws into question the constitutionality of the Act of September 13, 1960, 74 Stat. 918, 50 U.S.C. § 167-167n and the Act of June 21, 1938, 52 Stat. 821-833, 15 U.S.C. § 717, Acts of Congress affecting the public interest, it is noted that 28 U.S.C. § 2403 may be applicable. No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403, certified to the Attorney General the fact that the constitutionality of such Acts of Congress has been drawn in question.

STATEMENT OF THE CASE

Petitioners Northern Natural Gas Company and Cities Service Gas Company are interstate natural gas pipeline companies. Petitioners Northern Helex Company, Northern Gas Products Co., Cities Service Cryogenics, Inc., and Cities Service Helex, Inc., are helium extraction and affiliated companies. The United States, Panhandle Eastern Pipe Line Co., National Helium Corporation and Phillips Petroleum Company were parties below and generally supported the position of the petitioners. (App. B, 41a).

Respondents, hereinafter referred to as "independent producers", are Mobil Oil Corporation; Ashland Oil & Refining Company; Cabot Corporation; Cities Service Oil Company; Dorchester Gas Producing Company; Gulf Oil Corporation; Helmerich & Payne, Inc.; Pan-American Petroleum Corporation; Diamond Shamrock Corporation; Superior Oil Company; Mapco Production Company and Texaco Inc., and appear individually and as representatives of a class of approximately 500 independent producers of natural gas (App. B, 41a).

Respondents Ralph Grounds, et al., hereinafter referred to as "landowners", are the approximately 850 named persons listed in Appendix L, infra, p. 226a, who appear individually and as representatives of a class of approximately 30,000 mineral interest owners. (App. B, 41a).

All of these actions involve the ownership of helium contained in or extracted from natural gas and produced from wells drilled in the Chase Group of the Permian formation of the Hugoton gas area in Kansas, Oklahoma, and Texas. Helium-bearing natural gas

is produced from these lands by independent producers operating under oil and gas leases granted by the landowners.

Under long term contracts which for the most part antedate the Helium Act Amendments of 1960, the independent producers sell such helium-bearing natural gas to the petitioning interstate natural gas pipeline companies on a volumetric basis. These private contracts make no provision for the separate sale or disposition of the helium component. (App. B, 132a). Section 1 (b) of the Natural Gas Act states that the provisions of such Act shall apply to the sale in interstate commerce of natural gas for resale. Accordingly, the independent producers have filed the contracts here involved with the Federal Power Commission as gas rate schedules and the pipeline companies have paid them at the rates fixed or permitted to be paid by the Commission. Some of the prices specified in the contracts are higher than the rates found by the Commission to be just and reasonable, some are lower, and many are the same. (App. B, 147a).

Subsequent to such sales, quantities of such gas are processed for the extraction of various constituents which are sold as separate products and the residue is sold by the pipeline companies in interstate commerce for resale. The Federal Power Commission has jurisdiction over the residue sales, but does not exercise rate jurisdiction over the separate sales of the extracted products. (App. B, 149a). In the case of the helium constituent, the pipeline companies sell such helium to affiliated extraction companies under separate contracts prior to the separation of such helium from the natural gas with which it is commingled. (App. B, 41a).

Less than 44% of the total helium-bearing natural gas stream produced in the Hugoton gas area is processed through complex extraction plants in which the petitioners helium extraction companies have invested many millions of dollars. (App. A, 25a, 34a, 37a). Subsequent to the separation of such helium from the natural gas with which it is commingled, the extraction companies sell such helium to the United States under separate contracts which form a substantial part of the government's Helium Conservation Program. Section 11 of the Helium Act Amendments of 1960 states that the provisions of the Natural Gas Act shall not be applicable to such sales of helium, and the government has agreed to indemnify petitioners helium extraction companies for all sums for which petitioners may become liable to others to the extent that such sums exceed three dollars per Mcf of contained helium. (App. A, 11a).

FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

These cases had their genesis in numerous class actions instituted in the state and federal district courts of Oklahoma and Kansas by various groups of landowners asserting claims of title to the helium component of helium-bearing natural gas extracted by petitioners and sold to the United States. (App. E, 182a). Confronted with a multitude of conflicting claims, petitioners filed the instant interpleader actions in the United States District Court for the District of Kansas to resolve the matter of title to such helium constituent in a single forum. Ancillary to such proceedings petitioners also obtained injunctions restraining the respondents from prosecuting any other actions affecting the subject matter. Petitioners did not de-

posit a sum of money into the registry of the court, but executed substantial bonds conditioned upon compliance with the further order of the Court. (App. E, 192a).

Respondent landowners and respondent independent producers filed motions to dismiss the actions and for orders dissolving the injunctions on the ground that petitioners had not deposited a fund of money into the registry of the court, or a bond in lieu of such fund. Overruling such contentions in a comprehensive memorandum addressed to that point, the District Court found that the principal issue in dispute was not the ownership of a fund of money but rather the ownership or claim to ownership of the helium interest; that the money paid by the United States as such is derivative from and secondary to the helium interest, and concluded: "We hold that the subject matter of controversy as contemplated by the interpleader statute is the claim of ownership under the mineral leases of the helium produced and marketed." (App. E, 192a).

The Court of Appeals for the Tenth Circuit granted the landowners and the independent producers an interlocutory appeal under the provisions of 72 Stat. 1770 (28 U.S.C. § 1292(b)) and heard the matter before the court sitting in banc (Before Murrah, Chief Judge, and Pickett, Lewis, Breitenstein, Hill and Seth, Circuit Judges). The Court of Appeals affirmed. *Ralph Grounds, et al.* v. *Northern Natural Gas Co., et al.*, 327 F.2d 1003 (App. D, 198a).

On remand the interpleader actions were consolidated with the pending actions brought against the United States under the Tort Claims Act and the Tucker Act. The District Court determined that the doctrine of original primary jurisdiction was not applicable in an ac-

tion to determine the issue of title to helium (App. B, 158a); held that the exemption of Section 11 of the Helium Act Amendments of 1960 was not applicable to the independent producers' sales of helium-bearing natural gas to the interstate natural gas pipeline companies (App. B, 154a); held in favor of the petitioners and the United States on the title issues, and taxed all costs and attorneys' fees against the petitioners. (App. C, 171a).

PROCEEDINGS IN THE COURT OF APPEALS

In eighty-eight separate appeals respondents appealed on the merits and petitioners appealed on the question of costs and attorneys' fees. A panel of the Court of Appeals affirmed the trial court in holding all issues as to title to the helium constituent in favor of petitioners and the United States. (App. A, 22a, 27a). Without mention of the doctrine of primary jurisdiction, the Court of Appeals then reversed the trial court on the alternate claims of the independent producers arising under Section 11 of the Helium Act Amendments, on the follows grounds:

1. By reason of Section 11, the provisions of the Natural Gas Act, the jurisdiction of the Federal Power Commission, and gas rate schedules filed thereunder, do not apply to the helium constituent of helium-bearing natural gas sold for resale by independent producers to interstate pipeline companies. (App. A, 3a).

2. The pricing provisions of private contracts between independent producers and pipeline companies for all volumes of gas sold in interstate commerce do not apply to the helium constituent of such sale, if such

helium constituent is subsequently extracted and sold to the United States (App. A, 35a).

3. Holding there is a "void" created by the Natural Gas Act and the Helium Act Amendments, the Court of Appeals ordered petitioners to account to the independent producers for the reasonable value of the helium constituent of helium-bearing natural gas which petitioner extraction companies actually extracted and sold to the United States, such payments to be in addition to the rates fixed or permitted to be paid by the Federal Power Commission. (App. A, 36a, 37a).

The Court of Appeals then affirmed the judgment of the trial court taxing against petitioners all costs and attorneys' fees incurred by all claimants in all cases, including the cases in which the United States was a party. (App. F, 199a).

REASONS FOR GRANTING THE WRIT

In the *Permian Basin Area Rate Cases,* 390 U.S. 747, 767, reversing in part 375 F.2d 6 and 35 (Tenth Circuit), reh. den. 392 U.S. 917, this Court "... emphasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts." This Court also emphasized in that case (822) that: "The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." (Citing: *Federal Power Com.* v. *Sierra P. P. Co.,* 350 U.S. 348, 355; *F.P.C.* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 153; *United Gas Pipe Line Co.* v. *Mobile Gas Corp.,* 350 U.S. 332).

Notwithstanding the foregoing, the Court of Appeals for the Tenth Circuit in the instant proceedings has bypassed the Federal Power Commission, abrogated the contractual agreements of the parties, and concluded to award to independent producers selling helium-bearing natural gas in interstate commerce for resale the "reasonable value" of the helium constituent over and above the rates fixed or permitted to be paid either by the Federal Power Commission or by the contracts for the sale of such helium-bearing natural gas. In reaching that result, the Court of Appeals has raised a number of important public as well as private issues which merit review by this Court.

1. The Decision Below Is Contrary to the Intent of Congress in the Accommodation of the Helium Conservation Program With the Proper Administration of the Natural Gas Act

While the total effect of the decision by the Court of Appeals on the administration of the Natural Gas Act and the Helium Conservation Program under the Helium Act Amendments of 1960 cannot be measured at the present time, its impact is both discernible and substantial, and the construction of these two important public Acts should be finally resolved by this Court.

Section 1(b) of the Natural Gas Act (52 Stat. 821, 15 U.S.C. § 717), states that the provisions of such Act shall apply to the sale in interstate commerce of natural gas for resale. Section 11 of the Helium Act Amendments of 1960 (74 Stat. 922, 50 U.S.C. § 167i), states that the provisions of the Natural Gas Act shall not apply to the sale of helium and provides a method for allocating income and costs in gas rate proceedings

where such helium is extracted from helium-bearing natural gas.

In *Panhandle Eastern Pipe Line Co.* v. *Federal Power Com'n.*, 359 F.2d 675, the Eighth Circuit, citing this Court's opinion in *Federal Power Commission* v. *Panhandle E. P. L. Co.*, 337 U.S. 498, 514, reconciled the acts so as to produce a "symmetrical whole." In interpreting and construing the Natural Gas Act with the Helium Act, the Court of Appeals for the Tenth Circuit in the instant proceedings has found that a "void" has been created by the two statutes. (App. A, 36a). Such determination defeats the intent of Congress with respect to the administration of both Acts, for no such "void" exists.

As borne out by the language of the Helium Act Amendments of 1960 and its legislative history, it was the intent of Congress by Section 11 to accommodate the purposes of the Helium Act to encourage private enterprise and at the same time to permit the Federal Power Commission to effectively perform its tasks intended by the Natural Gas Act. The Helium Act Amendments of 1960 carefully delineate the distinction between "helium-bearing natural gas" on the one hand, and "helium" as a separate commodity of commerce on the other. *E.g.* §§ 2(3), 3, 4, 5, 6, 11 and 15 (App. K-3, 212a). Section 11 exempts the sale of helium from the provisions of the Natural Gas Act, but it does not exempt the sale of helium-bearing natural gas. Cf. *F.P.C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 26-28.

In addition to the literal words of the Helium Act Amendments, the intent of Congress in Section 11 not to impair the jurisdiction of the Federal Power Commission over sales of helium-bearing natural gas is

fortified by extensive legislative history before the 86th Congress,* summarized by Senator Carroll in the debates surrounding the enactment of Section 11, as follows (App. B, 151a; R. 1: App. Below, pp. 2160-2161; 106 Cong. Rec. 18603):

> "I wish the Record to be crystal clear, so that any court which reads this Record will know what is the specific legislative intent, namely that we are not exempting helium-bearing gas from jurisdiction of the Federal Power Commission under the Natural Gas Act . . . I wish to say that we have now restored in the bill clearly and conclusively for the Record, the provision that the Federal Power Commission has jurisdiction over helium-bearing gas and authority to allocate costs."

2. The Decision Below Conflicts With the Decision of the Eighth Circuit as to the Proper Interpretation of Section 11

The reconciliation of Section 11 of the Helium Act Amendments of 1960 with the Natural Gas Act is a matter of first impression in this Court and the matter should be settled here to resolve a direct conflict between the decision of the Court of Appeals for the Tenth Circuit in the present case and the decision of the Court of Appeals for the Eighth Circuit in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Com'n.*, 359 F.2d 675, as to the proper construction of Section 11.

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* Cf. *United States* v. *Public Utilities Commission*, 345 U.S. 295, 315, reh. den. 345 U.S. 961: "Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation. Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion. And that method of determining Congressional purpose is likewise applicable when the literal words would bring about an end completely at variance with the purpose of the statute." (Citations omitted).

In this case the Tenth Circuit holds that the Federal Power Commission has no jurisdiction over the sale of helium-bearing natural gas insofar as such sales pertain to the contained helium. (App. A, 33a). In *Panhandle,* the Eighth Circuit held, at page 679: "The Court concludes that § 11 states that the Commission has no jurisdiction over *the helium 'itself',* either while commingled with natural gas or after it has been extracted. Such exemption from the Natural Gas Act's operation, however, does not prevent the Commission from exercising jurisdiction over *'helium-bearing natural gas.'* The statutory language and its legislative history compel this conclusion." (Emphasis supplied).

3. The Decision Below Conflicts in Principle With Applicable Decisions Construing the Jurisdiction of the Federal Power Commission Under the Natural Gas Act.

When the Court below concluded that the Helium Act and the Natural Gas Act created a "void" (App. A, 36a), the Court misapprehended the pervasive coverage of the Natural Gas Act. No such "void", "attractive gap" or regulatory no man's land exists *F.P.C.* v. *Transcontinental Gas Corp.,* 365 U.S. 1, 19-28. Under settled decisions of this Court and of the several Courts of Appeals, where "non-jurisdictional gas" is commingled with the other gas which is sold in interstate commerce for resale the jurisdiction of the Federal Power Commission attaches to the entire gas stream. Such principle applies whether such "non-jurisdictional" gas takes the form of a sale not for resale as in *California* v. *Lo-Vaca Gathering Co.,* 379 U.S. 366; *Federal Power Com.* v. *Amerada Petroleum Corp.,* 379 U.S. 687, reh. den. 380 U.S. 959, and 989; or takes the form of gas which is sold in

interstate commerce but destined for consumption in the state of its production as in *Pennsylvania Water & P. Co.* v. *Federal Power Com.*, 343 U.S. 414; *Louisiana Public Service Com'n.* v. *Federal Power Com'n.*, 359 F.2d 525 (Fifth Circuit), certiorari denied 385 U.S. 833; or takes the form of gas which contains "non-jurisdictional" products as in *Jupiter Corporation* v. *Federal Power Commission*, 424 F.2d 783, 789-790 and 792-793 (D.C. Circuit), certiorari denied 397 U.S. 937; *Deep South Oil Co. of Texas* v. *Federal Power Com'n.*, 247 F.2d 882, 888 (Fifth Circuit).

4. The "Void" in Regulatory Authority Found by the Court of Appeals Should Be Closed To Avoid Federal and State Conflict in Regulation of the Natural Gas Industry.

The rationale behind this Court's decision to strictly construe exceptions to the jurisdiction of the Natural Gas Act (*Interstate N. G. Co.* v. *Federal Power Com.*, 331 U.S. 682, 690, 691, reh. den. 332 U.S. 785; *United States* v. *Public Utilities Commission*, 345 U.S. 295, 310, reh. den. 345 U.S. 961), and in borderline cases to decide that federal authority under the Act governs (*F.P.C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 19-20), suggests an independent reason why the regulatory "void" found by the Court of Appeals in these cases should be filled. That reason is to avoid potential conflict between state and federal authority in the regulation of the natural gas industry. Cf. *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44 and *Cities Serv. G. Co.* v. *Peerless O. & G. Co.*, 340 U.S. 179 with respect to the power of a state to fix minimum prices for natural gas after and before this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682, reh. den. 348 U.S. 851.

Northern Nat. Gas Co. v. *State Corp. Com.*, 372 U.S. 84, reh. den. 372 U.S. 960, was an action to test the authority of a state regulatory commission to require interstate pipeline companies to purchase gas ratably from all wells connected to their pipeline systems in each gas field within the state. In holding that the state commission's orders invaded the exclusive jurisdiction which the Natural Gas Act has conferred upon the Federal Power Commission, this Court reviewed the pervasive scope of the Natural Gas Act and announced the following test (p. 93): " . . . 'whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.' *F.P.C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 19, 20."

Nor does it matter that State authority has not presently filled the "void" left in the Natural Gas Act by the decision below. In this case, as in *Northern Nat. Gas Co.* v. *State Corp. Com., supra,* pages 92, 97-98, the federal question does not arise from an asserted actual and immediate conflict between federal and state regulation, but there lurks such imminent possibility of collision that the "attractive gap" found by the Court of Appeals in these proceedings should be closed at its inception.

5. The Decision Below Abrogates Private Contracts in a Manner Which the Federal Power Commission Has Not Found Necessary for the Proper Administration of the Natural Gas Act.

The contracts between the independent producers and the natural gas pipeline purchasers provide a unit price for all volumes of gas sold and delivered without respect to the individual constituents of the gas stream. Having held that the gas rate schedules were

inapplicable to the volumes attributable to the helium constituent of the gas sold and delivered under those contracts, the Court of Appeals then held that the Natural Gas Act "makes fundamental changes in those contracts" (App. A, 32a), "their provisions on price and term are superseded by FPC regulation" (Id. p. 33a), "In our opinion private contract law and the principles applicable thereto are not controlling." (Id. p. 35a), and "These provisions have been largely nullified by FPC regulations." (Id. p. 35a).

Thus, after holding that neither gas rate schedules nor the pricing provisions of preexisting contractual arrangements were applicable to the volumes attributable to the helium constituent in a sale of helium-bearing natural gas, the reviewing court substituted its preference for the "reasonable value" of the helium component. That holding clearly conflicts in principle with the decisions of this Court in the *Permian Basin Area Rate Cases,* 390 U.S. 747, 820-822, reh. den. 392 U.S. 917; *Federal Power Com.* v. *Sierra P. P. Co.,* 350 U.S. 348, 355; *FPC* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 153, and *United Gas Pipe Line Co.* v. *Mobile Gas Corp.,* 350 U.S. 332. As stated in the latter case at page 338: "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act [the Act relied upon by the Court of Appeals in the instant cases (App. A, 32a, 37a)], which in effect precludes private rate agreements . . ."

First, the Court of Appeals overlooks the fact ". . . that the service in which the producer engages is distinct from the contract which regulates his relationship with the transmission company in performing the service." *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137, 153, reh. den. 364 U.S. 856, and cases cited. As this Court announced in that case, page 155: "The short of the matter is that Mobile recognized that there were two sources of price and supply stability inherent in the regulatory system established by the Natural Gas Act—the provisions of private contracts and the public regulatory power." Therefore, when the Court of Appeals in the cases at bar struck down the jurisdiction of the Federal Power Commission over rate schedules, insofar as such rate schedules covered the helium constituent of helium-bearing natural gas, such holding could not under the decisions of this Court, *ipso facto,* "nullify" or abrogate the pricing provisions of the private contracts underlying such rate schedules.

Second, the existence vel non of "circumstances of unequivocal public necessity" which require the abrogation of private contractual arrangements fixing prices for all volumes of helium-bearing natural gas sold and delivered in interstate commerce for resale is a matter within the exclusive province of the Federal Power Commission. *Permian Basin Area Rate Cases,* 390 U.S. 747, 767, 820-822, reh. den. 392 U.S. 917.*

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* Cf. Section 5(b) of the Natural Gas Act wherein Congress has expressly provided that the Commission ". . . may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas."

Third, if jurisdiction to determine such policy matters under the Natural Gas Act is vested initially in a Court of Appeals reviewing an interpleader action to determine claims of title to the helium constituent of helium-bearing natural gas, there is no evidence in this record to show that the exigencies of the Natural Gas Act require the abrogation of such private contractual arrangements. Moreover, any such determination springing from power vested in a court of review raises serious constitutional questions under the Fifth Amendment.

6. The Construction Placed Upon the Natural Gas Act and the Helium Act by the Decision Below Vitiates Private Contracts in Contravention of the Due Process Clause.

The Court of Appeals has construed the Helium Act Amendments of 1960 and the Natural Gas Act in a manner which is inconsistent with the Due Process Clause of the Fifth Amendment to the federal Constitution, and the decision below should be reviewed by this Court to remove the constitutional infirmities now inherent in those two important public Acts and to protect the property rights of petitioners.

Before the passage of the Helium Act Amendments of 1960 the pipeline companies here involved had a contract right to purchase natural gas, including the helium constituent, on a volumetric basis and at the price agreed upon in such contracts.

After the passage of the Helium Act Amendments of 1960 the Court of Appeals holds that the pipeline purchasers must account retrospectively to the sellers of such helium-bearing natural gas for the "reasonable value" of the helium constituent which the pipeline purchasers and helium extracting companies elect to

extract from such helium-bearing natural gas and sell to the United States. This result obtains, says the Court, because the Helium Act Amendments of 1960 and the Natural Gas Act vitiate the prices agreed upon by the parties in their contracts for the entire stream of gas, insofar as such prices are applicable to volumes attributable to the extracted helium component.

The vice in such reasoning is that the due process clause of the Fifth Amendment in the field of federal activity demands that a public law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained. See *Nebbia* v. *New York,* 291 U.S. 502, 525; *United States* v. *Carolene Products Co.,* 304 U.S. 144; *Atlanta Motel* v. *United States,* 379 U.S. 241. No such relationship between appropriation of petitioners' contract rights and the public objectives of the Natural Gas Act or the Helium Act Amendments has been established. Moreover, as a matter of elementary justice, ". . . taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process." *Missouri Pacific R. Co.* v. *Nebraska, ex rel. Board of Transportation,* 164 U.S. 403, 417.

7. To Promote Proper Relationships Between Courts and Administrative Agencies, Primary Jurisdiction Is Vested in the FPC To Determine Its Own Jurisdiction Under the Natural Gas Act.

In any event, if the jurisdiction of the Federal Power Commission over the sale and transportation in interstate commerce of helium-bearing natural gas including the helium constituent therein is to be questioned, it is appropriate that the court proceeding should be suspended and the matter referred to the

Federal Power Commission under the principles announced in *United States* v. *Western P. R. Co.*, 352 U.S. 59, since that Commission has primary responsibility for the administration of the Natural Gas Act.* Judicial precedent in other Circuits for such procedure in cases involving the jurisdiction of the Federal Power Commission under the Natural Gas Act was squarely set in *J. M. Huber Corporation* v. *Denman*, 367 F.2d 104, and *Weymouth* v. *Colorado Interstate Gas Company*, 367 F.2d 84, 101 (Fifth Circuit); also see: *Interstate Nat. Gas Co.* v. *Southern California Gas Co.*, 209 F.2d 380 (Ninth Circuit), and *Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe L. Co.*, 173 F.2d 783 (Sixth Circuit). Moreover, "An attack on a rate order is the classic one for primary jurisdiction in an administrative agency." *Jupiter Corporation* v. *Federal Power Commission*, 424 F.2d 784, 790-791, (D.C. Circuit), citing *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, and *Mobile, supra.*

8. By Exceeding Its Interpleader Jurisdiction the Court of Appeals Has Cast an Additional Burden on the Federal Court System.

In the present proceedings the Court of Appeals has exceeded its jurisdiction in the administration of the interpleader remedy in two respects and such un-

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* As helium is a diminishing space-age resource relating to the national defense and the transportation and sale of natural gas is affected with a public interest, review by the Commission becomes even more imperative in the light of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321 et seq., which requires consultation with and obtaining the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. *E.g.* see: *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Com.*, — F.2d — (D.C. Circuit, Nos. 24,839 and 24,871, July 21, 1971).

warranted expansion of jurisdiction should be reviewed here to prevent an undue burden on the federal court system in such cases.

First, The Court of Appeals had no jurisdiction in these interpleader suits to entertain independent cross-claims arising solely out of rights allegedly bestowed by Section 11 of the Helium Act Amendments. The complaints in the interpleader suits were cast in the form of equitable actions *in rem* in which the interpleader plaintiffs sought, ". . . in net effect, an adjudication that quiets their title to all helium sold to the United States." (App. B, 169a). The alternative cross-claims of the independent producers brought *in personam* under Section 11 arose entirely from rights allegedly created by the laws of the United States, and it is settled doctrine that a case cannot arise under the laws of the United States unless the alleged right or immunity created by such laws is an element, and an essential one, of the *plaintiff's* cause of action. *Pan American P. Corp.* v. *Superior Court,* 366 U.S. 656, 663; *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667, 672, and cases cited.

Second, the Court of Appeals expanded the jurisdiction of the federal courts in the administration of the interpleader remedy to *in personam* issues beyond the scope of the subject matter of the controversy. The subject matter of these interpleader actions and the jurisdiction of the federal courts was deemed of such difficult and controlling importance at the inception of these proceedings that the Court of Appeals for the Tenth Circuit granted an interlocutory appeal under the provisions of 72 Stat. 1770, 28 U.S.C. § 1292(b) and heard the question of the trial court's jurisdiction before the Court sitting in banc. When the Court of Appeals affirmed in those interlocutory proceedings

that the subject matter of the actions was the claim of ownership of the helium component, that became the law of the case and defined the outer limits of the controversy. When the District Court on the merits and the Court of Appeals on review determined all such claims of ownership to the helium component, interpleader jurisdiction was exhausted. *State Farm Fire & Cas. Co.* v. *Tashire,* 386 U.S. 523.

Third, in *State Farm Fire & Cas. Co.* v. *Tashire,* at pages 535-536, this Court made it abundantly clear that the modern interpleader device cannot be used as an all purpose "bill of peace" capable of sweeping dozens of lawsuits out of the various state and federal courts and into one monolithic proceeding. That is particularly true where, as here, the interpleader device, predicated as it is on minimal diversity, is coupled with multiple class action under Rule 23, Federal Rules of Civil Procedure, and the policy of the statute calls for a strict construction so as not to increase the rising caseload in the federal courts beyond the precise limits which the statute has defined. *Snyder* v. *Harris,* 394 U.S. 332, at page 340, reh. den. 394 U.S. 836.

In these proceedings, there are eight consolidated actions involving the jurisdiction of two agencies of the United States under two statutes, three major natural gas pipeline companies and their affiliated helium extraction companies, a class of more than 500 major oil companies and other independent producers, a class of landowners comprised of an estimated 30,000 persons and corporations who are citizens of most of the fifty United States. It took over eight years of sustained effort on the part of the courts and the parties and their attorneys at a cost of several million dollars just to determine the title to the helium con-

tained in helium-bearing natural gas produced under thousands of separate oil and gas leases and sold by the producers under several hundred individually tailored gas purchase and sales contracts.

That should have concluded the matter. Yet, the Court of Appeals, after fully disposing of such title issues on appeal, has here enlarged the scope of its interpleader jurisdiction to embrace *in personam* issues arising out of the Court's own imposed separation of ownership of the helium component and the benefits derived from such ownership. The complexity of the accounting procedures ordered by the Court of Appeals among the thousands of parties to this one proceeding alone staggers belief and may well usurp the efforts of the federal courts for years to come in a manner never intended by the framers of the interpleader remedy.*

2. Departure From Usual Course of Judicial Proceedings Awarding Costs and Attorneys' Fees in Interpleader Actions.

One other matter merits the attention of this Court. That relates to the power and discretion of the federal courts in actions brought under the interpleader statute to deny costs to the plaintiffs in interpleader and

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* Following the precedent set by the Court of Appeals decision in the instant proceedings, landowners have instituted additional class actions of a massive scale involving other helium operations. *Clarence Gigot, et al.* v. *Cities Service Oil Co. et al.*, No. W-4611; *Wiley R. Gore, et al.* v. *Amerada Hess Corp. et al.*, No. W-4612; *Oliver Brown, et al.* v. *Mobil Oil Corporation, et al.*, No. W-4613, in the United States District Court for the District of Kansas. The independent producers have threatened similar actions and one such case has been instituted. *Terace Inc.* v. *Kansas-Nebraska Natural Gas Company, Inc.*, Civ. 71-453 in the United States District Court for the Western District of Oklahoma.

to tax such costs and the attorneys' fees of all claimants incurred in all cases, including consolidated cases in which the United States is a party, against the plaintiffs in interpleader and their asociated companies who were successful in establishing their claims to the subject matter of the controversy. Procedurally, the District Court did just that (App. C, 171a) and the Court of Appeals affirmed (App. F, 199a).

As the salutary remedy of interpleader is favored by the law, the rulings with respect to the costs and attorneys' fees incurred in such actions should be reviewed by this Court because the rulings of the courts below on this matter represent a wide and clear departure from the accepted and usual course of judicial proceedings and threaten the efficacy of the remedy as announced in countless federal decisions. (The cases are collected in 3a *Moore's Federal Practice (2d Ed.)* § 22.02 and § 22.16 [2]). The District Court in the first instance and the Court of Appeals in reviewing such determinations have ignored the substance of the statutes governing costs in the federal courts (Rule 54(d), Federal Rules of Civil Procedure; 62 Stat. 955, 28 U.S.C. § 1920 (1948); 62 Stat. 973, 28 U.S.C. § 2412 (1948)), and the equitable principles governing the taxing of costs and attorneys' fees early established by this Court in *Hobbs* v. *McLean*, 117 U.S. 567, 582 and more recently reviewed in *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227; *Fleischmann* v. *Maier Brewing Co.*, 386 U.S. 714, and *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinion of the Tenth Circuit.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1971

No. 71-238

NORTHERN NATURAL GAS COMPANY, et al., (Helex Group),
Petitioners,

vs.

RALPH GROUNDS, HENRY HITCH, et al.,
(Landowners),

AND

SOCONY MOBIL OIL CO., INC., (MOBIL OIL CORPORATION substituted), et al., (Lessee-Producers), *Respondents.*

BRIEF IN OPPOSITION OF RESPONDENTS ASHLAND OIL & REFINING COMPANY, CABOT CORPORATION, DORCHESTER GAS PRODUCING COMPANY, HELMERICH & PAYNE, INC. AND TEXACO INC.

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BRIEF IN OPPOSITION OF RESPONDENTS ASHLAND OIL & REFINING COMPANY, CABOT CORPORATION, DORCHESTER GAS PRODUCING COMPANY, HELMERICH & PAYNE, INC. AND TEXACO INC.

OPINIONS BELOW

The opinions delivered in the courts below (A. 2a, 39a) are reported in 441 F.2d 704 (10 Cir.), and 292 F.Supp. 619 (D. Kan.).

QUESTIONS PRESENTED

1. Are the petitioning Helex companies (natural gas pipelines and their subsidiaries), who extract and sell helium, required to pay lessee-producers the reasonable value of commingled helium delivered, in addition to the Federal Power Commission rates paid for natural gas pursuant to the Natural Gas Act, when Section 11 of the Helium Act[1] specifies that the Natural Gas Act shall not apply to sale of the commingled helium?

2. Does the Federal Power Commission have primary jurisdiction to determine whether Federal Power Commission rates for natural gas include helium commingled with the natural gas when Congress has declared the Natural Gas Act inapplicable to sale of helium prior to or after its separation from the natural gas?

STATUTE INVOLVED

Section 11 of the Helium Act, as added by the Helium Act Amendments of 1960, Pub. L. 86-777, 74 Stat. 922, 50 U.S.C. § 167i, provides:

> "Sec. 11. The provisions of the Natural Gas Act of June 21, 1938 (52 Stat. 821; 15 U.S.C. 717-717w), as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 4 and 5 of the Natural Gas Act, as amended, whenever helium is extracted from helium bearing natural gas, there shall

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1. 74 Stat. 922, 50 U.S.C. § 167i.

be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.

STATEMENT OF CASE

Helium is a noncombustible gas naturally occurring in gas reservoirs in the Hugoton-Panhandle Gas Field area in Texas, Oklahoma and Kansas. (A. 7a). It composes about one-half of one percent of the gas in the geological reservoirs from which the gas is produced. (A. 9a, 10a).

The United States commenced helium extraction in Texas in 1917, and, until 1960, was for practical purposes the sole extractor and seller of separated helium. (A. 8a). During those years, the United States always relied on oil and gas leases as authorizing production of helium, and conveying title thereto. Hence, its contracts for helium supplies were made with lessee-producers who owned the oil and gas leases and produced the gas. (R. Vol. II, 529-537).

Pursuant to the Helium Act Amendments of 1960 (74 Stat. 918, 50 U.S.C. §§ 167 et seq.), the United States executed long term helium acquisition contracts with certain pipeline subsidiaries, which subsidiaries constructed helium separation plants, and separated the helium for sale to the United States. (A. 24a-25a).

The petition seeks review of the judgment below entered in six actions in the nature of interpleader (28 U.S.C. § 1335).

The interpleader actions were brought by pipeline and subsidiary companies (herein called Helex companies), who extract and sell helium, against two classes of adverse claimants: (1) landowners who granted oil and gas leases, and (2) lessee-producers who own the leases and produce gas containing helium.[2]

Respondents Ashland Oil & Refining Company, Cabot Corporation, Dorchester Gas Producing Company, Helmerich & Payne, Inc. and Texaco Inc. are representatives of the lessee-producer class.

The interpleader fund consisted of the proceeds of sale of extracted helium by the Helex Company plaintiffs. (A. 6a, 67a). It was not limited, as petitioners erroneously assert, to the so-called "title" to helium.

The basic issues below were (1) whether the oil and gas leases authorized lessee-producers to produce and market helium gas as well as other gaseous constituents produced by their gas wells, and (2) if so, whether lessee-producers were entitled to payment from the fund of a reasonable value for the helium contained in natural gas delivered to Helex companies.

The District Court after a lengthy trial found that helium gas was covered by the oil and gas leases. (A. 165a). The Court of Appeals affirmed. (A. 22a).

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2. Petitioners Cities Service Gas Company, Cities Service Cryogenics, Inc. and Cities Service Helex, Inc. brought four of the interpleader actions. Petitioners Northern Natural Gas Company, Northern Helex Company, and Northern Gas Products Company brought one interpleader action. The judgments on appeal in those actions are the subject of the petition for certiorari herein.

Panhandle Eastern Pipeline Company and its subsidiary National Helium Corporation brought the other interpleader action, which is the subject of their petition for certiorari in No. 71-243.

As to claims for helium payment by lessee-producers, the Court of Appeals held that the lessee-producers were entitled to recover from the interpleader fund the reasonable value of commingled helium delivered by lessee-producers. (A. 6a, 37a). Lessee-producers conceded that royalty on payment for helium so recovered would be paid by them to the landowners who held the royalty interests in the leases. (A. 23a).

Prior to 1960, helium gas in the Hugoton-Panhandle Gas area in Kansas, Oklahoma and Texas, was a wasted, noncombustible impurity contained in natural gas. (A. 5a, 153a). But mushrooming demand for helium in space rocketry, atomic energy and technological developments, caused helium unexpectedly to become more valuable than the natural gas containing it. (A. 9a). Its unique characteristics made it irreplaceable and invaluable in supplying those needs. (R. Vol. II, 414-423, Vol. V, 1435, 1519-1520, 1574). Overnight, other helium source areas then used by the United States, which were thought ample for a hundred years (R. Vol. III, 1174, Vol. II, 637), suddenly became inadequate. Practically all of the free world supply was found in the Hugoton-Panhandle area. (A. 9a).

The natural gas containing helium in the Hugoton-Panhandle Area was practically all committed to natural gas markets prior to 1960, under large long-term gas contracts wherein values and price were keyed to BTU heat content. (A. 30a). Helium, being noncombustible, produces no BTU's and is wasted on the consumer's burner-tip if not extracted before the natural gas is used. (A. 5a).

In effectuating the helium conservation program under the 1960 amendments to the Helium Act, the United States contracted for helium supplies with large-volume pipeline purchasers of natural gas, who acquired the gas under FPC Rate Schedules wherein prices were regulated

pursuant to the Natural Gas Act. (A. 23a-24a).[3] The Federal Power Commission Rate Schedules are the long-term gas purchase contracts filed as the Rate Schedules, in which contract prices are superseded by Federal Power Commission regulatory limitations. (A. 23a).

In the helium acquisition contracts, the United States and the pipelines (and their helium extractor subsidiaries) recognized that claims to payment for commingled helium would be made by third parties, and the Helex companies agreed to pay such third parties up to $3.00 per m.c.f. if such payment was required. (A. 11a). The United States agreed to reimburse the Helex companies for any amounts paid in excess of such amount. Of principal concern were the rights of lessee-producers to be paid for helium, now that it had suddenly become an economic commodity of value, rather than a wasted impurity. (A. 11a).

The Federal Power Commission rates for natural gas are, of course, fixed pursuant to the provisions of the Natural Gas Act. However, Section 11 of the Helium Act states that the provisions of the Natural Gas Act "shall not be applicable to the sale . . . of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled." 74 Stat. 918, 50 U.S.C. Sec. 167i.

The ultimate question in the cases is whether the Helex companies can acquire valuable commingled helium for nothing, i.e., by paying only the usual Federal Power

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3. The United States contracted with the pipelines (their subsidiaries) because they controlled large volumes of helium bearing gas, and were few in number. Other alternate methods of acquiring the helium by condemning royalty and lessee-producer interests in the helium were rejected because of delay which would have resulted in nonrecoverable loss of helium. (R. Vol. III, 1177-1179, 1193-1200, 1181, 1185, 1190).

Commission rates for natural gas, which by statute does not apply to the unregulated helium therein; or whether Helex companies shall be required to pay the reasonable commercial value of the unregulated helium delivered to them by lessee-producers.

To pose the foregoing question is to answer it. The inequity and illogic of the Helex position which would distort Section 11 into a private discriminatory act for their exclusive benefit is self-evident.

Lessee-producers believe the Court of Appeals was manifestly correct in applying Section 11 in accord with its plain terms in holding that Federal Power Commission rates under the Natural Gas Act do not apply to sale of helium prior to its separation from the natural gas. Under the rate regulation decisions of this Court condemning non-uniform, discriminatory treatment of rate-regulated activities, payment of the reasonable value of unregulated helium is clearly required, as the Court of Appeals rightly held.

The Court of Appeals thus found it unnecessary to consider lessee-producers' right to recovery based on equitable contract principles of frustration, and mistake, which were also asserted below. (A. 35a).

The Court of Appeals, in unanimously sustaining the claims of lessee-producers, based its decision on § 11 of the Helium Act and the law of rate regulation. The Court's decision hinged primarily on the first clause of § 11 which provides,

> "The provisions of the Natural Gas Act of June 21, 1938 (52 Stat. 821; 15 U.S.C. 717-717w), as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from

> the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas."

Upon full consideration of the text and legislative history of § 11 and the purposes and policy of the Helium Act and the Natural Gas Act, it construed this clause in accordance with its plain meaning, saying

> "In our opinion this means what it says and, if the Natural Gas Act does not apply, a service rate fixed thereunder does not apply to sales of contained helium." (A. 33a).

From this it follows that:

> "The situation is that a nonregulated commodity (helium) is necessarily produced in conjunction with a regulated commodity (natural gas)." (A. 31a).

In view of the established value of unregulated commingled helium, the Court held that the lessee-producers are entitled to recover its reasonable value out of the interpleaded funds in conformity with the decisions of this Court which hold that when unregulated commodities or services are furnished in addition to regulated commodities or services, payment of the reasonable value of the unregulated commodities or services is required. (*Baltimore & Ohio R.R. Co.* v. *United States,* 305 U.S. 507 (1939) (terminal warehousing and in-transit warehousing); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.,* 306 U.S. 516 (1939) (grain-door installation); *United States* v. *Wabash R. Co.,* 321 U.S. 403 (1944) (plant yard car-spotting)).

The Court of Appeals notes that recovery by the lessee-producers out of the interpleaded funds "does not adversely affect gas consumers. Consumers' rights to just and reasonable rates are still protected by the Natural Gas Act and the Federal Power Commission, and are not increased

by either recognition or payment of helium values." (A. 37a). The Court also noted that, if recovery were denied, "a utility rate may be used to obtain a commodity or service which is not within the contemplation of that rate". (A. 37a). Thus the decision accomplishes "the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole". (A. 37a).

ARGUMENT

The decision of the Court of Appeals is a correct construction and application of a plain statute, with a clear legislative history, in accordance with settled principles of statutory construction and the law of rate regulation. The decision will affect few, if any, persons other than the present litigants. It does not conflict with the decision of any other court of appeals and is in accord with analogous decisions of this Court. The asserted constitutional question is insubstantial.

The decision below accomplishes substantial justice by requiring payment of a reasonable value for the unregulated commodity, helium, to those producing and supplying it. It in no way affects consumer prices for natural gas. It permits the helium extractors to make a fair profit on their unregulated helium extraction operations.

For these reasons, it is unnecessary for this Court to review this decision.

I. The Court of Appeals' Decision Effectuating Section 11 of the Helium Act Is Clearly Correct. The Decision Does Not Conflict with Any Other Case, and Has Limited Consequences.

The decision of the Court of Appeals construes and applies § 11 of the Helium Act in accordance with the

rules of rate regulation, long settled by decisions of this Court, that neither more nor less than the lawful rate may be paid for a regulated commodity, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), and that when an additional valuable commodity or service is also received, payment must be made for its reasonable value, in addition to the lawful rate for the regulated commodity or service, *Baltimore & Ohio R.R. Co.* v. *United States*, 305 U.S. 507 (1939); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939); *United States* v. *Wabash R. Co.*, 321 U.S. 403 (1944). These rules are based on the underlying principle that "any deviation from the lawful rate would involve either an undue preference or an unjust discrimination", *Western Union Tel. Co.* v. *Esteve Bros. & Co.*, 256 U.S. 566, 573 (1921), and that there are such preferences and discriminations unless additional payment is made for additional valuable services or commodities.

The Helex position seeking to avoid payment of a reasonable value for commingled helium delivered by lessee-producers, ultimately rests upon a single premise which is demonstrably fallacious. The fallacious premise is that Federal Power Commission service rates for natural gas, imposed pursuant to the Natural Gas Act, include and apply to commingled helium prior to the time such helium is separated from the natural gas unless the parties make a separate contract applicable only to helium. Although sought to be buttressed in various ways, the fallacy and error inherent in the Helex position is obvious under the plain terms of Section 11 of the Helium Act, its legislative history, and every other pertinent test available.

The plain wording of § 11 of the Helium Act is all-inclusive in making the Natural Gas Act inapplicable to commingled helium. It does not limit the nonapplicability of the Natural Gas Act to sales of commingled helium only when the pipeline companies choose to make separate contracts for helium, as they claim. The primary first clause provides flatly and without qualification:

> "The provisions of the Natural Gas Act . . . shall not be applicable to the sale . . . of helium . . . prior to . . . the separation of such helium from the natural gas with which it is commingled. . . ."

The supplementing second clause provides that "in determining the rates of a natural gas company" all helium income and expense shall be excluded, including "costs of exploration [and] production. . . ." This clearly includes the lessee-producers as well as the Helex group, since the exact holding of this Court in *Phillips* is that a producer is "a 'natural gas company' within the meaning of that term as defined in the Natural Gas Act. . . ." *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 677 (1954).

Moreover, the costs of "exploration [and] production" which are to be excluded in Federal Power Commission rate determinations are costs of the lessee-producers —not the pipeline companies. Thus the primary first clause denies Federal Power Commission any direct jurisdiction, and the supplementing second clause any indirect jurisdiction, over sales of commingled helium. Such sales by the lessee-producers to the pipeline companies were the only ones being made when § 11 was enacted.[4]

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4. As noted by the Court of Appeals, Section 11's exclusion of the Natural Gas Act from sale of commingled helium obviously applies to lessee-producers' sales of natural gas in the area in question, for otherwise Section 11 would have no practical effect. The Helex interpretation, it said, "is startling". (A. 30a).

Both clauses plainly include the lessee-producers and in neither is there the slightest intimation that inclusion depends on the pleasure of the pipeline companies in granting separate new contracts to pay for commingled helium. The attempt by petitioners to so limit the statute for their private benefit is totally unjustified.

The legislative history of § 11 shows that its only purpose is to exclude sales of both commingled and separated helium from Federal Power Commission rate regulation, without at the same time excluding the natural gas. The most important part of the legislative history, quoted in the opinion of the Court of Appeals, is the report of the Senate Committee, which says,

> "Section 11 covers the jurisdiction of the Federal Power Commission in this area. The section makes it clear that the Federal Power Commission retains its jurisdiction over natural gas containing helium but has no jurisdiction over helium itself."
>
> . . .
>
> "Attention is also called to the fact that the language dealing with the Federal Power Commission (sec. 11) was worked out cooperatively between the committee, the Under Secretary of Interior, and the Chairman of the Federal Power Commission." (Sen. Rept. No. 1814, R. Vol. VII, 2111, 2116).

Both before and after enactment of § 11, Federal Power Commission has made it clear that its jurisdiction does not extend to sales of commingled helium. When the primary first clause of § 11 was amended at the Senate hearing to read as it now does, Federal Power Commission's General Counsel said,

> "Then Senator, what you have said is that the Natural Gas Act has nothing to do with helium, which is something with which we are in agreement. We are

not trying to acquire any jurisdiction over the helium." (R. Vol. VII, 2033).

Similarly, Federal Power Commission's Chairman said in his letter to the Senate Committee,

> "This amendment would make it clear that the Commission's jurisdiction over natural gas which contains helium is not to be set aside by the bill, but that the Commission would have no jurisdiction over helium while it is commingled with natural gas or after it has been extracted." (R. Vol. VII, A. 2098).

Nowhere in the legislative history is there a single line which even hints that Congress did not intend the exclusion of § 11 to apply to the lessee-producers' sales of commingled helium, as well as to the helium sales of the Helex group, or that it was to apply to the lessee-producers' sales only if the pipeline companies found it desirable or convenient to make separate new contracts to pay for commingled helium.[5]

Since the enactment of § 11, Federal Power Commission itself has twice recognized that it has no jurisdiction over sales of commingled helium. In *Phillips Petroleum Co.* v. *Ashland Oil & Refining Co.*, 40 F.P.C. 390, 391-392 (1968), it said,

> "And, under Section 11 of the Helium Act Amendments of 1960, the Commission has no jurisdiction over the price of helium." (R. Vol. I, 248, 250).

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5. Indeed, Representative Rogers who sponsored the bill which was ultimately enacted, made it clear that Congress expected producer and royalty interests to receive compensation for helium. (Hearings before the Subcommittee on Mines and Mining, 86th Congress, Second Session, R. Vol. III, 1031, at 1093-1094).

The Helex companies themselves have contracted for sale of commingled helium prior to its separation. They concede that such contracts are not subject to FPC regulation under the Natural Gas Act. (R. Vol. V, 1482, 1501, 1504, 1523).

Similarly, in *Gulf Oil Corp.*, 38 F.P.C. 69 (1967), it said,

> ". . . the price for helium is payable by Northern or the United States Government under their helium agreement. Certainly it is clear that the jurisdictional customers of Northern should not be adversely affected by whatever set-off claims, if any, Gulf may have against Northern with respect to helium."

At no time during the nine years that these suits have been pending up to the writing of this brief has Federal Power Commission sought to intervene and be heard.

Thus the plain wording and legislative history of § 11 of the Helium Act and the opinions of Federal Power Commission so clearly support the Court of Appeals' construction of § 11 that this Court's plenary consideration of the strained construction sought by the Helex companies is not warranted.

No Conflict of Decision

This is the first case which has construed and applied § 11 of the Helium Act to interstate sales of helium-bearing natural gas. The only other case in which § 11 has been considered is *Panhandle Eastern Pipeline Co.* v. *FPC*, 359 F.2d 675 (8th Cir., 1966). In that case FPC ordered Panhandle to include liquefiable hydrocarbons, as well as fuel gas, in its application for a transportation certificate to the same hydrocarbon extraction and helium separation plant of National Helium Corporation which is involved in this action. The Court of Appeals rejected Panhandle's contention that this violated § 11 of the Helium Act, because "a reading of the order displays that the order pertains to only the 'hydrocarbon' portion of the shrinkage volumes" not the commingled helium. 359 F.2d at 680. Thus, the Eighth Circuit held that § 11 does not free liquefiable hydrocarbons from FPC jurisdiction even though they are commingled with helium.

Here the Tenth Circuit has held that § 11 does not subject helium to FPC jurisdiction even when it is commingled with hydrocarbons. Both decisions recognize that FPC jurisdiction embraces the hydrocarbons, but does not include the commingled helium. Moreover, presence of nonjurisdictional helium in natural gas in no way deprives the FPC of its existing jurisdiction of the natural gas. The decisions complement each other and there is no conflict between them.

Section 11 Is Constitutional

The petitioners assert a constitutional right "to purchase natural gas, including the helium constituent, on a volumetric basis, and at the price agreed upon in such contracts". (Pet. 20). They claim the decision below violates this right. The assertion is without factual or legal basis because petitioners do not pay contract prices, but FPC service rates. The service rates are so much lower than contract prices that the Hugoton-Anadarko Area Rate Order (FPC Mimeo p. 16), estimates the refunds which it orders to "be approximately 47 million dollars". Thus the Court of Appeals was entirely correct when it said that the price provisions of the gas purchase contracts "have been largely nullified by FPC regulations." (A. 35a).

A graphic illustration of contract price nullification is noted by the Court of Appeals, wherein contract price adjustment clauses which otherwise would have enabled lessee-producers to obtain payment for current helium value, have been frustrated by application of FPC regulatory rates applicable only to natural gas. (A. 35a). It is apparent that, if non-discriminatory principles of rate regulation did not require recovery by lessee-producers, common law principles of frustration, restitution and unjust enrichment would require such recovery, although

the Court below found it unnecessary to decide the case on this basis. The same illustration demonstrates the lack of any genuine constitutional issue in these cases.

Over fifty years ago this Court rejected the claim that orders fixing just and reasonable rates "are invalid for the reason that if given effect they will supersede the rates designated in the private contract between the parties." *Union Dry Goods Co.* v. *Georgia P.S. Corp.*, 248 U.S. 372, 375 (1918). The same constitutional validity inheres in the Natural Gas Act. *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 582-583 (1942).

Moreover, the principles of rate regulation applied by the Court of Appeals in these cases has frequently been applied by this Court and is of undoubted constitutional validity. *Baltimore & Ohio R.R. Co.* v. *United States*, 305 U.S. 507 (1939); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939); *United States* v. *Wabash R. Co.*, 321 U.S. 403 (1944).[6]

Limited Consequences

When § 11 was enacted in 1960, the fields in the Hugoton area contained 99% of the nation's helium reserves. (A. 30a). Commercially recoverable helium is not found in the nation's other important gas fields which supply fuel for natural gas consumers.

The present decision affects only the three helium plants of petitioners directly involved herein, and the helium plants of Phillips Petroleum Company and its subsidiary, and one other helium plant jointly owned by petitioner Cities Service Cryogenics, and Kansas-Nebraska Natural Gas Company. Pending lawsuits referred to by petitioners involve these plants.

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6. Petitioners never raised these constitutional claims until they filed petitions for rehearing below.

The helium supplied by these plants is sufficient to supply and conserve the helium needs of the free world for the foreseeable future.

Thus, the decision below will affect only these few parties and has no widespread impact.

Moreover, as already noted, the helium profits of these parties are sufficient to enable them to pay a reasonable value to lessee-producers for unregulated, commingled helium, and still retain ample profit.

The decision below also assures substantial justice by providing lessee-producers and royalty owners a payment for valuable helium they supply to this nation and the free world.

II. FPC Does Not Have Primary Jurisdiction Over Commingled Helium.

When Congress made the provisions of the Natural Gas Act inapplicable to the sale of helium prior to its separation from the natural gas with which it is commingled, it also made inapplicable to these sales any primary jurisdiction which FPC may previously have had and the "contract abrogation" doctrine of this Court's *Mobile* and *Permian Basin* decisions. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Permian Basin Area Rate Cases*, 390 U.S. 747, 818-822 (1968).

If FPC ever had primary jurisdiction to determine whether service rates for natural gas cover commingled helium before § 11 was enacted, it was an authority delegated by Congress in the Natural Gas Act. By enacting § 11 of the Helium Act, Congress exercised its own plenary authority to declare commingled helium to be an unregulated commodity to which FPC service rates do not apply.

This statute necessarily revoked any authority which FPC may previously have had. It necessarily made inapplicable to sales of commingled helium the "contract abrogation" doctrine of *Mobile* and *Permian Basin,* which doctrine is dependent on application of the Natural Gas Act. That doctrine is that the FPC, exercising its jurisdiction under the Natural Gas Act, may abrogate private contract provisions only when necessary to effectuate the purposes of the Natural Gas Act, and will otherwise recognize contract provisions.

Obviously, FPC primary jurisdiction is wholly dependent on the Natural Gas Act, as is the applicability of the "contract abrogation" doctrine.

Section 11 of the Helium Act is Congress' declaration that this regulatory system, established for the protection of natural gas consumers, does not apply to the unregulated helium operations of the Helex group, nor to any sales of commingled helium, as FPC itself recognizes.

The professed concern of the Helex group over the effect of this decision on FPC jurisdiction and Natural Gas Act administration is not shared by FPC, and has no relation to the interests of natural gas consumers, who never receive the non-combustible commingled helium which is extracted by the Helex group.[7] This professed concern relates only to the profitability of the Helex group's unregulated helium operations. It is a sham intended to cloak the Helex group in the mantle of rate regulation

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7. FPC itself recognizes the plain terms of Section 11 of the Helium Act. In *Phillips Petroleum Co.* v. *Ashland Oil & Refining Co.*, 40 FPC 390, it accepted primary jurisdiction of natural gas rates, but declined to accept any jurisdiction over the commingled helium delivered by Ashland, one of the respondents herein. (R. Vol. I, 248).

which Congress intended for the protection of natural gas consumers.[8]

CONCLUSION

The decision below is clearly correct in applying Section 11 of the Helium Act in a uniform and non-discriminatory manner. It accomplishes substantial justice for all parties.

The decision does not conflict with any other cases. It is in accord in principle with the Eighth Circuit in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Com'n,* 359 F.2d 675 (8th Cir., 1966).

The decision affects only a few litigants and does not have a widespread impact now, or in the future.

---

8. The profits of the Helex companies have approximated $7.00 per m.c.f. of helium out of their sales price of approximately $12.00 per m.c.f. (R. Vol. II, 523; Vol. III, 935-936, 964, 1101-1119; Vol. V, 1488, 1493). Thus, payment of a helium value to lessee-producers of the $3.00 maximum liability of the Helex companies would leave an obviously ample profit.

It is apparent that the Helex arguments regarding primary jurisdiction of the FPC is an afterthought, since they initially brought the interpleader actions in federal court without reference to any such primary jurisdiction theory.

No substantial reason is presented for this Court to review the complicated record in these cases, particularly when an experienced and able panel of judges below has already done so with great care.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-238

NORTHERN NATURAL GAS COMPANY, ET AL.,
Petitioners,

VERSUS

MOBIL OIL CORPORATION, ET AL.,
and
RALPH GROUNDS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the
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OCTOBER TERM, 1971

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NORTHERN NATURAL GAS COMPANY, ET AL.,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF MOBIL OIL CORPORATION, ET AL.

This brief is submitted by seven of the twelve lessee-producer respondents, which seven are Mobil Oil Corporation, Cities Service Oil Company, Gulf Oil Corporation, Amoco Production Company (formerly Pan American Petroleum Corporation), Diamond Shamrock Corporation, The Superior Oil Corporation, and Mapco Production Company.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 441 F.2d 704.

The opinion of the District Court is reported at 292 F.Supp. 619.

The opinion of the Court of Appeals upon the interlocutory appeals in 1964 is reported at 327 F.2d 1003.

JURISDICTION

The jurisdictional requisites are adequately stated in the petition.

QUESTION PRESENTED

Whether the provision of § 11 of the Helium Act that "The provisions of the Natural Gas Act . . . shall not be applicable to the sale . . . of helium . . . prior to . . . the separation of such helium from the natural gas with which it is commingled. . . ." and the rules of law of rate regulation obligate interstate gas pipeline companies to pay producers of helium-bearing natural gas the reasonable value of commingled helium, in addition to FPC service rates for natural gas, when subsidiaries of the pipeline companies separate the commingled helium before the gas is delivered to its consumers and sell the separated helium to the United States pursuant to the Helium Act.

STATUTE INVOLVED

Section 11 of the Helium Act, 74 Stat. 922, 50 U.S.C. § 167i, as added by the Helium Act Amendments of 1960,* 74 Stat. 918, 50 U.S.C. §§ 167-167m, provides,

> "Sec. 11. The provisions of the Natural Gas Act of June 21, 1938 (52 Stat. 821; 15 U.S.C. 717-717w), as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 4 and 5 of the Natural Gas Act, as amended, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.

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* This statute is a total amendment of the Helium Act of 1925, as amended, provides that the Act as so amended may be cited as the Helium Act, and § 11 is § 11 of the Helium Act as so amended and is not § 11 of the Helium Act Amendments of 1960. It is, therefore, hereafter referred to as § 11 of the Helium Act.

STATEMENT

Nature of the Actions

These are class actions in the nature of interpleader brought under 28 U.S.C. § 1335 by the petitioners (the Helex group) against these respondents (lessee-producers) and others (landowners) to determine adverse claims to funds which are the proceeds paid to petitioners by the United States for helium which the petitioners separate from helium-bearing natural gas before the natural gas is delivered to its consumers and sell to the United States pursuant to contracts authorized by the Helium Act Amendmends of 1960. There are also two actions brought by the landowners against the United States, one under the Tucker Act, 28 U.S.C. § 1346 (a) (2) and one under the Tort Claims Act, 28 U.S.C. § 1346 (b), but the lessee-producers are not parties to these two actions and the United States is not a party to the interpleader actions.

The petition seeks review of the decision below upon the adverse claims of only two of the three adverse claimants. These two are the petitioners (the Helex group) and the respondents (lessee-producers). Two other members of the Helex group are seeking review of the same decision in No. 71-243, *Panhandle Eastern Pipe Line Co. and Nat'l Helium Corp.* v. *Mobil Oil Corp., et al., and Ralph Grounds, et al.* The petition in that case and in this one present the identical question and the lessee-producers adopt this brief as our brief in that case. These two petitions do not involve the claims of the landowners, who are now seeking review by this Court of the Court of Appeals' affirmance of the District Court's dismissal of their claims in No. 71-218,

Ralph Grounds, Henry Hitch, et al. (Landowners) v. *Northern Natural Gas Co., et al. (Helex Group), and Socony Mobil Oil Co., Inc., et al. (Lessee-Producers).*

The Helex group, petitioners here and in No. 71-243, are three interstate gas pipeline companies (pipelines) and their subsidiaries which operate the helium-separation plants. They claim the interpleaded funds in their entirety. The twelve respondent lessee-producers sell to the pipelines the helium-bearing natural gas from which the commingled helium is separated and represent all of the more than 500 producers who do so. We claim that § 11 of the Helium Act, the law of rate regulation and unjust enrichment entitle us to the portion of the interpleaded funds which equals the reasonable value of the commingled helium at the points where we deliver the helium-bearing natural gas to the three pipelines. We make no claim to the portion of the interpleaded funds which equals the cost plus a reasonable profit to the Helex group of transporting and separating the commingled helium. We acknowledge that we are obligated to pay royalty to the landowners in accordance with the terms of applicable oil and gas leases upon any recovery out of the interpleaded funds. The District Court denied, but the Court of Appeals sustained, this claim.

Production and Sale of Natural Gas and Helium

The helium-bearing natural gas, which is the source of the interpleaded funds, is produced from the Hugoton-Panhandle field, the largest gas field in the nation, and smaller adjacent fields in southwestern Kansas, the Oklahoma Panhandle, and the Texas Panhandle (A. 9a). The lessee-producers sell and deliver the gas in the field to the pipelines for transmission and resale in interstate commerce. The only consideration which the pipelines pay is the lessee-producers' FPC service rates for the sale of natural gas. All gas purchase contracts have been filed with FPC as the Gas Rate Schedules of the lessee-producers and, with insignificant exceptions, this occurred long before § 11 of the Helium Act was enacted in 1960. No contract expressly provides that the contract price shall be the FPC service rate or that either the contract price of the FPC service rate shall cover commingled helium as well as natural gas. No pipeline has made a separate new contract with any lessee-producer to make an additional payment for commingled helium.

The commingled helium is separated by subsidiaries of each of the three pipelines at plants built astride their trunk lines pursuant to three 22-year term sales contracts made in 1961 with the Secretary of the Interior. The separated helium, mixed with about 30 per cent nitrogen, is delivered at the tailgates of the plants into the helium pipeline of the United States Bureau of Mines, through which it is transported to the Bureau's Cliffside storage field near Amarillo, Texas, from which it will be withdrawn when needed, purified to 99.995 per cent purity by the Bureau of

Mines, and sold to the helium industry. The Bureau of Mines pays the Helex group prices of about $12 per Mcf for separated helium and sells purified helium for $35 per Mcf. The gas from which the commingled helium has been separated is returned to the trunk lines and continues on its way to natural gas consumers.

Commingled Helium Is Valuable

Both the District Court and the Court of Appeals found that the commingled helium is a valuable commodity before its separation from the natural gas. Both courts noted that an item of about $2 per Mcf for commingled helium is included in the prices of about $12 per Mcf which the Government pays for separated helium. This is because the price was negotiated by the Government "on the basis of costs comparable to those it would incur in a government-owned plant" and it was paying $2 per Mcf for commingled helium which it separates at the Bureau of Mines' Keyes Helium Plant (A. 2ba). Since the trial was limited to the issue of liability, the value of commingled helium was not determined but the Court of Appeals observed that its recognition "results in a price substantially higher than the FPC service rate" *(Id.)*.

FPC Service Rates and Contract Prices

The ceiling for increased service rates for natural gas in the Hugoton-Panhandle field was 11¢ per Mcf when helium separation began in 1962. Statement of General Policy No. 61-1, 24 F.P.C. 818 (1960), as amended, 18 C.F.R. § 2.56. The maximum just and reasonable rate for sales under contracts executed before November 1, 1969, is now 12.5¢ per Mcf in Kansas, 13.25¢ per Mcf in Oklahoma, and 13.5¢ per Mcf in Texas. *Hugoton-Anadarko Area Rate Order*, Docket Nos. AR 64-1, *et al.*, Mimeo. p. 26 (1970). These rates are less than the contract prices in the vast majority of sales, since, with insignificant exceptions, the prices had escalated to more than these prescribed maxima long before 1960. In consequence thereof, these prices were rolled back, refunds ordered and moratoriums imposed following both the Statement of General Policy and the Area Rate Order, which estimates these refunds will "be approximately 47 million dollars" (*Id.* p. 16). There are some sales in which the contract price is less than the minimum rate prescribed by the Area Rate Order, which is 10¢ in Kansas, 10.5¢ in Oklahoma, and 10.75¢ in Texas (*Id.* p. 30). There are also sales in which there is no contract price at all, since the term of the contract has expired.

The Decision of the District Court

Upon these facts the District Court dismissed the claims of the lessee-producers, without alluding to the rules of law of rate regulation. It considered that our right to recover "rests upon the gas purchase contracts" (A. 132a) and, applying conventional rules for the construction of private contracts, it construed the contracts to cover commingled helium as well as natural gas. It held that § 11 of the Helium Act "does not alter the scope of the gas purchase contracts . . . and does not *require* [but] merely permits" separate new contracts to pay for commingled helium (A. 154a). (Emphasis is the Court's.) Since there are not separate new contracts in these cases, but only the FPC Gas Rate Schedules of the lessee-producers, the District Court denied any recovery to the lessee-producers.

The Decision of the Court of Appeals

The Court of Appeals unanimously reversed and sustained the claims of the lessee-producers. It based its decision on § 11 of the Helium Act and the rules of law of rate regulation. The court's decision hinged principally on the primary first clause of § 11, which provides in pertinent part,

> "The provisions of the Natural Gas Act . . . shall not be applicable to the sale . . . of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled. . . ."

Upon full consideration of the text and legislative history of § 11, the only other decision construing it, and the purposes and policy of the Helium Act and the Natural Gas

Act, it construed this clause in accordance with its plain meaning, saying

> "In our opinion this means what it says and, if the Natural gas Act does not apply, a service rate fixed thereunder does not apply to sales of contained helium" (A. 33a).

From this it follows that

> "The situation is that a nonregulated commodity (helium) is necessarily produced in conjunction with a regulated commodity (natural gas)" (A. 31a).

In view of the established value of unregulated commingled helium, the Court held that the lessee-producers are entitled to recover its reasonable value out of the interpleaded funds in conformity with rate regulation decisions of this Court which hold, for example, that when carriers furnish valuable extra services in addition to the transportation of freight, they are entitled to payment of the cost or reasonable value of these extra services in addition to the freight rate for the line-haul. *Baltimore & Ohio R.R. Co.* v. *United States*, 305 U.S. 507 (1939) (terminal warehousing and in-transit warehousing); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939) (grain-door installation); *United States* v. *Wabash R. Co.*, 321 U.S. 403 (1944) (plant yard car-spotting) (A. 32a). The opinion notes that recovery by the lessee-producers out of the interpleaded funds "does not adversely affect gas consumers. Their rights to just and reasonable rates are still protected by the Natural Gas Act and the FPC and are not increased by either recognition or payment of helium values" (A. 37a). It also notes that, if recovery were de-

nied, "a utility rate may be used to obtain a commodity or service which is not within the contemplation of that rate" *(Id.)*. Thus, the decision accomplishes "the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole" *(Id.)*. The Court of Appeals explicitly admonished that its decision requires payment for only "the helium content of the processed gas" and that it does not permit payment "for the helium content of non-processed gas" *(Id.)*.

ARGUMENT

The decision of the Court of Appeals is a correct construction and application of a plain statute with a clear legislative history in conformity with settled principles of statutory construction and the law of rate regulation. The decision will affect few, if any, persons other than the present litigants. It does not conflict with the decision of any other court of appeals and is in accord with analogous decisions of this Court. The asserted constitutional question is insubstantial. For all of these reasons, it is unnecessary for this Court to grant plenary review of this decision.

THE COURT OF APPEALS' DECISION IS CLEARLY CORRECT

Alternative Constructions of Section 11

Of the three possible constructions of § 11 of the Helium Act, the construction by the Court of Appeals is the only one which accords with its text and legislative history and which results in equality and uniformity of application, whether FPC service rates for natural gas are higher, lower, or the same as the contract prices, or whether there is no contract price at all. In every event, the lawful service rate is payable for regulated natural gas. Additionally, reasonable value is payable for valuable unregulated commingled helium which is later separated, but nothing is payable for valueless commingled helium which is not. This is in accord with the law of rate regulation.

The second alternative would be to construe § 11 as permitting additional payments for commingled helium when there are separate new contracts to do so. This is the construction adopted by the District Court and suggested by the petition in No. 71-243, which says that § 11 "was primarily intended for the benefit of the pipelines" and entitles the lessee-producers to only "such benefit as they could achieve in *new* contracts" (Pet. pp. 9-10). (Emphasis is theirs.) This construction would conflict with the prohibition against undue preferences and prejudices by natural gas companies, Natural Gas Act § 4(b), 52 Stat. 822, as amended, 15 U.S.C. § 717c(b), by licensing the pipelines to pay favored suppliers for commingled helium, even when it is not separated and has no value. The third alternative would be to construe § 11 as applicable only to helium

sales by the Helex group and not to commingled helium sales by the lessee-producers. This would make § 11 completely inapplicable to the Hugoton gas area, even though it contained 99 per cent of the nation's helium reserves when § 11 was enacted in 1960 (A. 5a). These two alternatives to the Court of Appeals' construction find no support in either the text or the legislative history of § 11.

The Text of Section 11

The plain wording of both clauses of § 11 of the Helium Act clearly embraces the lessee-producers and places no condition whatever upon the nonapplicability of the provisions of the Natural Gas Act to our sales of commingled helium. The primary first clause provides flatly and without qualification

> "The provisions of the Natural Gas Act . . . shall not be applicable to the sale . . . of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled. . . ."

The supplementing second clause provides that "in determining the rates of a natural gas company" all helium income and expense shall be excluded, including "costs of exploration [and] production. . . ." This clearly includes the lessee-producers as well as the Helex group, since the exact holding of this Court is that a producer is "a 'natural gas company' within the meaning of that term as defined in the Natural Gas Act. . . ." *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 677 (1954). Moreover, the costs of "exploration [and] production" which are to be excluded in FPC rate determinations are costs of the lessee-producers—

not the pipelines. Thus, the primary first clause denies FPC any direct jurisdiction, and the supplementing second clause any indirect jurisdiction, over sales of commingled helium. Such sales by the lessee-producers to the pipelines were the only ones being made when § 11 was enacted. Both of its clauses plainly include the lessee-producers and in neither is there a single word which hints that inclusion is at the grace and indulgence of the pipelines in granting separate new contracts to pay for commingled helium. Nor is there a line in the legislative history which does so.

The Legislative History of Section 11

The legislative history of § 11 shows that its only purpose is to exclude sales of both commingled and separated helium from FPC rate regulation without at the same time excluding the natural gas. The most important part of the legislative history, quoted in the opinion of the Court of Appeals (A. 29a), is the report of the Senate Committee, which says,

> "Section 11 covers the jurisdiction of the Federal Power Commission in this area. The section makes it clear that the Federal Power Commission retains its jurisdiction over natural gas containing helium but has no jurisdiction over helium itself." S. Rep. No. 1814, 86th Cong. 2d Sess. 5 (1960).

The report also says,

> "Attention is also called to the fact that the language dealing with the Federal Power Commission (sec. 11) was worked out cooperatively between the committee, the Under Secretary of Interior, and the Chairman of the Federal Power Commission." *Id.* 10.

Both before and after enactment of § 11, FPC has made clear its understanding that its jurisdiction does not extend to sales of commingled helium. When the primary first clause of § 11 was amended at the Senate hearing to read as it now does, FPC's General Counsel said,

> "Then Senator, what you have said is that the Natural Gas Act has nothing to do with helium, which is something with which we are in agreement. We are not trying to acquire any jurisdiction over the helium." Hearings on H.R. 10548 and S. 3376 before the Senate Commitee on Interior and Insular Affairs, 86th Cong., 2d Sess. 77 (1960).

In speaking of the same amendment, FPC's Chairman said in his letter to the Senate Committee,

> "This amendment would make it clear that the Commission's jurisdiction over natural gas which contains helium is not to be set aside by the bill, but that the Commission would have no jurisdiction over helium while it is commingled with natural gas or after it has been extracted." *Id.* 93.

FPC Opinions

Since enactment of § 11, FPC has twice recognized its lack of jurisdiction over sales of commingled helium. In *Phillips Petroleum Co.* v. *Ashland Oil & Refining Co.*, 40 F.P.C. 390, 391-392 (1968), it said,

> "And, under Section 11 of the Helium Act Amendments of 1960, the Commission has no jurisdiction over the price of helium."

Similarly, in *Gulf Oil Corp.*, 38 F.P.C. 69 (1967), it said in speaking of Gulf's claims in these actions:

> ". . . the price for helium is payable by Northern or the United States Government under their helium agreement. Certainly it is clear that the jurisdictional customers of Northern should not be adversely affected by whatever set-off claims, if any, Gulf may have against Northern with respect to helium."

At no time during the eight years that these suits have been pending has FPC sought to intervene and be heard.

Thus the plain wording and legislative history of § 11 of the Helium Act and the opinions of FPC so clearly support the Court of Appeals' construction of § 11 that this Court's plenary consideration of the strained construction sought by the Helex group is not warranted.

Contract Abrogation, FPC Primary Jurisdiction and Natural Gas Act Administration

When Congress made the provisions of the Natural Gas Act inapplicable to sales of commingled helium, it also made inapplicable to these sales any primary jurisdiction which FPC may previously have had and the "contract abrogation" doctrine of this Court's *Mobile* and *Permian Basin* decisions. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Permian Basin Area Rate Cases*, 390 U.S. 747, 818-822 (1968). If FPC had primary jurisdiction to determine whether service rates for natural gas cover commingled helium when § 11 was enacted, it was an authority delegated by Congress in the Natural Gas Act. By enacting § 11 of the Helium Act, Congress exercised its own plenary authority to declare commingled helium to be an unregulated commodity to which FPC service rates do not apply and revoked any authority

which FPC may previously have had. It also made inapplicable to sales of commingled helium the "contract abrogation" doctrine of *Mobile* and *Permian Basin*. That doctrine is this Court's recognition that there are "two sources of price and supply stability inherent in the regulatory system established by the Natural Gas Act—the provisions of private contracts and the public regulatory power." *Sunray Oil Co.* v. *FPC*, 364 U.S. 137, 155 (1960). Section 11 of the Helium Act is Congress' declaration that this regulatory system, established for the protection of natural gas consumers, is not for the benefit of the unregulated helium operations of the Helex group.

Section 11 also makes irrelevant here the decisions relied on by the petitioners relating to FPC's jurisdiction over nonjurisdictional natural gas which is commingled with jurisdictional natural gas (pet. 15-16). Although the regulated utilities are barred by the Natural Gas Act from segregating the two by contract, *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), the Natural Gas Act does not bar Congress from removing sales of commingled helium from FPC rate regulation by § 11 of the Helium Act. Moreover, when § 11 is construed as Congress' adoption of the law of rate regulation, there will be none of the "havoc . . . with the federal regulatory scheme" and ability "to discriminate in favor of . . . 'non-jurisdictional' customers," *Lo-Vaca, supra*, at 369, which led this Court to condemn "restricted use" agreements in *Lo-Vaca*. Nor will there be any "void," as the petitioners assert, which will create "potential conflict between state and federal authority" (Pet. 16-17). Under the Court of Appeals' construction of § 11, federal law has perempted the field and

commands that the lawful service rate be paid for natural gas and reasonable value for commingled helium. There is no room for either private discriminations or the exercise of state regulatory power.

The professed concern of the Helex group over the effect of the Court of Appeals' decision on FPC jurisdiction and Natural Gas Act administration is not shared by FPC, which has never participated in these cases. It relates only to the profitability of the Helex group's unregulated helium operations and is a sham to cloak these operations in the mantle of rate regulation which Congress intended for the protection of natural gas consumers.

NO CONFLICT OF DECISION

This is the first case which has construed and applied § 11 of the Helium Act to interstate sales of helium-bearing natural gas. The only other case in which § 11 has been considered is *Panhandle Eastern Pipeline Co.* v. *FPC*, 359 F.2d 675 (8th Cir., 1966). In that case FPC ordered Panhandle to include liquefiable hydrocarbons, as well as fuel gas, in its application for a transportation certificate to the same hydrocarbon extraction and helium separation plant of National Helium Corporation which is involved in this action. The Court of Appeals rejected Panhandle's contention that this violated § 11 of the Helium Act, because "a reading of the order displays that the order pertains to only the 'hydrocarbon' portion of the shrinkage volumes," not the commingled helium. 359 F.2d at 680. Thus, the Eighth Circuit held that § 11 does not free liquefiable hydrocarbons from FPC jurisdiction even though they are

commingled with helium. Here the Tenth Circuit has held that § 11 does not subject helium to FPC jurisdiction even when it is commingled with hydrocarbons. Both decisions recognize that FPC jurisdiction embraces the hydrocarbons, but does not include the commingled helium. The decisions complement each other and there is no conflict between them.

SECTION 11 IS CONSTITUTIONAL

The asserted constitutional right of petitioners "to purchase natural gas, including the helium constituent, on a volumetric basis and at the price agreed upon in such contracts" (Pet. 20), is without factual or legal basis. The petitioners do not pay contract prices, but FPC service rates, which are so much lower that the Hugoton-Anadarko Rate Order estimates the refunds which it orders will "be approximately 47 million dollars." Mimeo. p. 16 (1970). Thus the Court of Appeals was entirely correct when it said that the price provisions of the gas purchase contracts "have been largely nullified by FPC regulations."

Over fifty years ago this Court, upon full review of its earlier decisions, rejected the claim that orders fixing just and reasonable rates "are invalid for the reason that if given effect they will supersede the rates designated in the private contract between the parties." *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U.S. 372, 375 (1918). In that case the Court spoke of State power, but in sustaining the validity of the Natural Gas Act twenty-four years later, it said "The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great un-

der the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce." *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 582-3 (1942). Thus the gas purchase contracts do not enjoy a sanctity which bridles the constitutional power of Congress to command in the Natural Gas Act that they shall apply to sales of natural gas, and in § 11 of the Helium Act that they shall not apply to sales of commingled helium. Moreover, the rule of law of rate regulation which the Court of Appeals applied here, requiring payment of the reasonable value of an unregulated commodity in addition to the service rate for a regulated commodity, has been frequently applied by this Court and is of undoubted constitutional validity *Baltimore & Ohio R.R. Co.* v. *United States*, 305 U.S. 507 (1939); *Lowden* v. *Simonds-Shields-Longsdale Grain Co.*, 306 U.S. 516 (1939); *United States* v. *Wabash R. Co.*, 321 U.S. 403 (1944).

FRUSTRATION AND UNJUST ENRICHMENT

"In the 1950's the demand for helium rose spectacularly," as the Court of Appeals found (A. 9a). This led to the 1960 Amendments of the Helium Act, which, as the District Court found, "created a market for helium which did not theretofore exist" (A. 153a). Prior to that time, commingled helium was not "of economic importance to the pipeline companies . . . who regarded it as a valueless diluent of the heating value of the stream." *(Id.)* Consequently, the gas purchase contracts and the area rate order impose reduced rates for deficiency in heating value, to which the commingled helium contributes (A. 134a).

A concrete example of how FPC rates for natural gas supersede contract prices is shown by rate regulation frustration of contract price adjustment provisions. Commingled helium has now become a valuable commodity even before its separation from the natural gas (A. 26a). But because of the interplay of the Natural Gas Act and § 11 of the Helium Act, there can be no payment for this valuable unregulated commodity under any provisions of the contracts which commonly provide for "periodic price escalation, arbitration, or renegotiation" (A. 35a). The Court of Appeals discussed as a typical example the plight of one of the lessee-producers, in which a 1966 arbitrated price, containing a value for helium as well as natural gas, was rolled back by FPC to the ceiling rate *(Id.)*. Thus the purpose of the arbitration clause to adjust the price to changing conditions has been frustrated as to helium by FPC rate regulation which does not apply to helium. Consequently, recovery by the lessee-producers of the reasonable value of unregulated commingled helium is supported by the most fundamental equitable principles of unjust enrichment as well as by the law of rate regulation.

NO FUTURE NATIONWIDE EFFECT

When § 11 was enacted in 1960, the gas fields of the Hugoton area contained "99% of the nation's recoverable supply of helium" (A. 6a). The only later discoveries of helium reserves of possible importance have been in "fields where the natural gas has no value as fuel and the fields are shut in." Hearing on Oversight on Helium Conservation before the House Subcommittee on Minerals, Materials,

and Fuels, 92d Cong., 1st Sess. 7 (1971). There is only one helium plant outside of the Hugoton gas area, and it also processes gas which will not burn. (*Id.* 31). Thus there is little likelihood that § 11 will ever have any application to any gas fields outside of the Hugoton gas area. In that area it will have application to few, if any, other persons than the parties to this litigation. Confirming this is the fact that all four of the so-called "massive class actions," referred to in the petitions (Pet. in No. 71-238, p. 25; Pet. in No. 71-243, p. 19), are in the Tenth Circuit, all involve parties to these actions, and one involves the identical parties.

INTERPLEADER JURISDICTION

The assertion of the Helex group that Federal jurisdiction in these cases extends only to determining title claims to the commingled helium, and not to the lessee-producers' *in personam* claims to the interpleaded funds based on the law of rate regulation, has no basis in fact or law. The Court of Appeals held "The interpleaded fund is the money paid and to be paid by the United States to the Helex companies for the helium gas mixture" (A. 33a). This assertion also ignores the nature of interpleader jurisdiction, which is always *in personam*, as this Court pointed out when it held that state courts cannot adjudicate adverse claims to interpleaded funds of absentee claimants upon substituted service. *New York Life Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (1916). This decision led to the Federal interpleader statute, but the statute did not change interpleader jurisdiction from *in personam* to *in rem*. It simply

made the United States District Courts' *in personam* jurisdiction nationwide. The difference between *in rem* jurisdiction to quiet title to land and nationwide Federal *in personam* interpleader jurisdiction is well illustrated by the holding that interpleader jurisdiction to determine the conflicting claims of landowners to oil royalties does not embrace *in rem* jurisdiction to quiet title to the land upon which the ownership of the royalties depends. *Knoll* v. *Socony Mobil Oil Co.*, 369 F.2d 425, 429 (10th Cir. 1966), *cert. denied* 386 U.S. 977 (1967).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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September, 1971

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446-953—71

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-218

RALPH GROUNDS, HENRY HITCH, ET AL. (LANDOWNERS), PETITIONERS

v.

NORTHERN NATURAL GAS COMPANY, ET AL.

No. 71-238

NORTHERN NATURAL GAS COMPANY, ET AL., PETITIONERS

v.

MOBIL OIL CORPORATION, ET AL.

No. 71-243

PANHANDLE EASTERN PIPE LINE COMPANY AND NATIONAL HELIUM CORPORATION, PETITIONERS

v.

MOBIL OIL CORPORATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

These consolidated cases involve the ownership of and payment for helium produced as a constituent

of natural gas from the Hugoton field located in Kansas, Oklahoma, and Texas, and purchased by the government pursuant to the Helium Act Amendments of 1960, Act of September 13, 1960, 74 Stat. 918, 50 U.S.C. 167 *et seq.* The parties include the class action representatives of the following groups: the owners of the pertinent mineral rights from which the gas is produced (collectively denominated the "Landowners," certain of whom are the petitioners in No. 71–218); entities which produce the gas from its natural location underground to the surface pursuant to leases with the Landowners (collectively denominated the "Lessee-producers"); and pipeline companies and their subsidiary or affiliated helium extraction companies, which purchase the gas from Lessee-producers under gas purchase contracts, separate the helium constituent, and sell the extracted helium to the government (collectively denominated the "Helex group"). The United States, which purchases the helium from the Helex group, is also a party, and, in general, is aligned with the Helex group.

The material facts are not in dispute and are set forth fully in the opinion of the court of appeals (App. A, 2a–38a;[1] 441 F. 2d 704) and in the Findings of Fact and Conclusions of Law of the district court (App. B, 39a–170a; 292 F. Supp. 619). Immediately prior to 1960, helium was used primarily to meet current demands and all extraction was effected by the government. The Helium Act Amendments of

[1] "App." refers to the separately-bound Appendix in No. 71-238.

1960 established a long-range program to conserve helium to meet future requirements.

The Amendments authorized the Secretary of the Interior to enter into long-term contracts for the purchase of partially extracted helium (a gas mixture containing about 50 to 70 percent helium) for storage underground. The Secretary entered into helium purchase contracts with four gas pipeline companies or their affiliates. In each contract, the seller warranted title to the helium or agreed to indemnify the government for all claims of third parties. The ultimate cost each seller might have to bear as a result of any such claims was limited, however, by various contract provisions.

Most of the gas mixture that is processed for helium extraction is produced under oil and gas leases. Generally, the lessee-producer sells the gas to a pipeline under a gas purchase contract; in some instances, a lessee-producer also has pipline facilities and retains the gas that it produces and sells the helium contained therein directly to the government. The gas purchase contracts customarily warrant title to all gas sold thereunder without reference to the various constituents that the gas actually contains.

Regulation of natural gas, which contains various hydrocarbon components, and of the helium constituent contained in it has long been separated between different federal agencies. Since the effective date of the Helium Act of March 3, 1925, 43 Stat. 1110, the Bureau of Mines of the Department of the Interior has conducted all government helium production ac-

tivities. The natural gas industry, on the other hand, has been regulated by the Federal Power Commission since the Natural Gas Act of 1938, 52 Stat. 821, 15 U.S.C. 717–717w, went into effect. The Helium Act Amendments of 1960 continue the historical separation of duties between these two governmental agencies (see Section 11 of the Amendments, 50 U.S.C. 167i).

In the present proceeding, eight actions were consolidated for trial. Two of these, known as the government cases, were brought by the Landowners against the government to determine ownership of the helium constituent of gas produced under oil and gas leases that they had granted. The government joined the four companies with whom it had helium purchase contracts as third-party defendants. The Helex group brought the other six suits as interpleader actions,[2] naming various Landowners and Lessee-producers as defendants. The government was not a party to any of the interpleader actions, but is interested in their outcome since in case of a title defect the helium sellers' liability is limited, which might result in a claim against the government.

The positions of the various groups can be summarized as follows. The Landowners contended that the leases under which they authorized production of gas cover only combustible hydrocarbon elements and not the helium or other noncombustible constituents, so

[2] Phillips Petroleum Company, one of the four companies with whom the government had helium purchase contracts, was not a plaintiff in these suits.

that they are still the owners of the latter. The Lessee-producers asserted that the Landowners' production leases conveyed to them the helium constituent of the gas produced thereunder, but that their gas purchase contracts with the pipeline companies did not convey to the latter the helium constituent; they argued further that if the gas purchase contracts did convey to the pipeline companies the helium constituent, nevertheless the price which they receive for the gas, which generally is subject to Federal Power Commission regulation, does not apply to the helium constituent because of the Helium Act Amendments of 1960, and accordingly they are entitled to an additional payment from the pipeline companies for the helium constituent. The Helex group claimed that the gas purchase contracts conveyed the entire gas stream, including any helium constituent, to them, and that the price fixed by the contracts, even if modified by Federal Power Commission regulation, was payment for the helium as well.

The district court initially held that the interpleader actions were correctly brought, and, on interlocutory appeal, the court of appeals affirmed this ruling *per curiam* (App. D, 178a–179a; 327 F. 2d 1003 (C.A. 10, *en banc*)). Following an extensive trial on the merits, the district court held that the Landowners' leases conveyed to the Lessee-producers all rights to the helium constituent, and accordingly denied the Landowners' claims against the government (in the government cases) based on conversion, or on a taking under the power of eminent domain, of the helium constituent (App. B, 111a–132a). In the interpleader

actions, the district court held that the gas purchase contracts conveyed the helium constituent to the pipelines, and that the payments made by the pipelines to the Lessee-producers for the gas were full consideration for the helium constituent as well (App. B, 132a–154a).

Some eighty-eight appeals were taken from the district court's decision on the merits and from the allowance of costs. The court of appeals affirmed the holding in the government cases (App. A, 12a–22a). In the interpleader actions, it held that the gas purchase contracts conveyed the helium constituent to the pipeline companies, but concluded, contrary to the district court's holding, that Federal Power Commission regulation of the contracts served to abrogate the contract price provisions, so that the Lessee-producers were entitled to payment from the interpleaded fund for the reasonable value of the helium constituent in all gas processed for helium extraction under the government's helium conservation program (App. A, 22a–38a). The court based its conclusion on Section 11 of the Helium Act Amendments of 1960 (50 U.S.C. 167i), which excepts from Federal Power Commission jurisdiction under the Natural Gas Act of 1938 the helium constituent in helium-bearing natural gas. From this it reasoned that the price for gas sold under gas purchase contracts subject to Federal Power Commission regulation was payment only for the non-helium portion of the gas. Petitions for rehearing filed by the Helex group and by the government were denied, as was the Landowners' motion to file a petition for rehearing out of time.

DISCUSSION

The United States believes that the petitions for writs of certiorari in Nos. 71–238 and 71–243 should be granted. The petition for a writ of certiorari in No. 71–218 is out of time, and should therefore be denied.

1. The court below held that neither the Federal Power Commission nor the Secretary of the Interior has jurisdiction with respect to the value of the helium constituent in helium bearing natural gas, where the helium is extracted from the natural gas stream pursuant to the government's helium conservation program and the helium constituent was not dealt with separately in the gas purchase contracts. This is an important decision of first impression concerning the interrelationship between the Natural Gas Act of 1938 and the Helium Act Amendments of 1960.

a. The interaction between the Gas Act and the Amendments created, in the words of the court below, a "void" in which "[n]either the FPC [under the Gas Act] nor the Bureau of Mines [acting for the Secretary of the Interior under the Amendments] has jurisdiction over the helium value of the natural gas" (App. A, 36a). The Court of Appeals for the Eighth Circuit, however, in *Panhandle Eastern Pipeline Company* v. *Federal Power Commission*, 359 F. 2d 675, reviewed carefully the purpose of the Amendments and their legislative history, and concluded that while they excluded Power Commission jurisdiction over the helium constituent itself, they did not "prevent the Commission from exercising jurisdiction over 'helium-bearing natural gas'" (359

F. 2d at 679), as to which the Commission could require compliance with its certification procedures.

The court below, on the other hand, gave little effect to the purpose and legislative history of the Amendments in finding that a "void" existed as to the helium value. Here, just as in *Panhandle Eastern,* it is clear that Congress intended that the Amendments would not terminate Power Commission jurisdiction over helium-bearing gas.

b. The court below further concluded that although the gas purchase contracts conveyed the helium constituent to the pipeline companies, the price provisions of those contracts were inoperative because they "have been superseded by FPC rate regulation," so that "the lessee-producers are entitled to the reasonable value of the contained helium" in the helium-bearing gas (App. A, 36a). The court held that Power Commission regulation of the maximum price obtainable under gas purchase contracts should not control as to the Lessee-producer's entitlement to payment for the helium constituent, since, in the court's view, the Helium Act Amendments precluded any Commission regulation of the price of the helium constituent. But neither the Amendments nor their legislative history mention this matter or suggest that Congress intended to abrogate the price provisions of gas purchase contracts entered into, in most instances, many years before.

c. Even on the basis of the court's own rationale, we think the decision below is deficient. Though the court based its holding that the helium value is not

fixed by the pricing provisions of the gas purchase contracts on the premise that "the price provisions thereof have been superseded by FPC rate regulation" (App. A, p. 36a), it then applied this holding to *all* helium bearing gas that is processed for helium extraction, regardless of whether the Power Commission actually regulates the price of the particular helium-bearing gas. As more fully set forth in the petition in No. 71–243 (pp. 13–18), the premise is not applicable in a number of instances, such as where the contract price does not exceed the Power Commission ceiling price, the contract is exempt from Power Commission regulation, or the lessee-producer sells the helium mixture directly to the government without selling to a pipeline.[3]

d. These cases are important, both on their own account and because of their effect on other litigation. The interpleaded fund itself amounts to many millions of dollars (see App. A, 34a; App. B, 107a).

[3] While the decision below was not based on unjust enrichment, the court does mention a possible "windfall" (App. A, 36a) for the Helex group if the Lessee-producers are not entitled to a separate payment for the helium value. The doctrine of unjust enrichment does not support the decision, since it has no application where, as here, there is an express contract. The facts of the present cases would not bring it into play in any event. The Helex group, not the Lessee-producers, made all investments necessary to carry out the helium conservation program envisaged under their contracts with the government and assumed all risks in connection therewith. Moreover, both courts below held that by virtue of the gas purchase contracts the Helex group actually owned the helium constituent. In these circumstances, it is clear the Helex group are not getting a "windfall" if they do not make a separate payment for the helium constituent.

And, as pointed out in the petitions in Nos. 71–238 (p. 25, n. *) and 71–243 (p. 19), the decision has already generated substantial additional litigation.

2. The petition in No. 71–218 is untimely. The judgment of the court of appeals (App. F) was entered on March 2, 1971. The government and members of the Helex Group filed timely petitions for rehearing, which the court denied on May 20, 1971 (App. H, I). The Landowners, who are the petitioners in No. 71–218, did not file timely petitions for rehearing; on June 8, 1971, they filed a motion for leave to file such petitions out of time, which the court below denied on June 9, 1971, "because it is untimely" (App. J, 209a).

The petitions for rehearing filed by other parties did not present any issue on behalf of the Landowners or pertaining to the court's judgment against them. As to the Landowners, therefore, the original judgment of the court controlled. Nor was the finality of that judgment suspended by reason of the Landowner's motion for leave to file a petition for rehearing out of time, since the petition "was not entertained or considered on its merits." *Bowman* v. *Loperena,* 311 U.S. 262, 266. Thus, the 90-day period for filing a petition for a writ of certiorari prescribed by 28 U.S.C. 2101(c) began on the date of the court's original judgment, March 2, 1971, and expired on May 31, 1971. No extension of time was granted. The petition in No. 71–218 was not filed until August 12, 1971, and, since the statutory time limitation is jurisdictional, the petition should be denied.

CONCLUSION

For the reasons stated above, the petitions in Nos. 71–238 and 71–243 should be granted, and the petition in No. 71–218 should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-238

NORTHERN NATURAL GAS COMPANY, ET AL.,
Petitioners,

VS.

MOBIL OIL CORPORATION, ET AL.,
Respondents,

AND

RALPH GROUNDS, ET AL.,
Respondents.

REPLY FOR PETITIONERS ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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REPLY FOR PETITIONERS ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The briefs of the independent producers implicitly concede that petitioners' questions are important, far reaching and serious, since their attempt to gloss over these questions rests on an improper and invalid construction of the Helium Act Amendments of 1960, and usages that Congress could not have intended to make relevant. Accordingly, they say that "the plain wording of §11 of the Helium Act (sic) is all-inclusive in making the Natural

Gas Act inapplicable to commingled helium. It does not limit the nonapplicability of the Natural Gas Act to sales of commingled helium only when the pipeline companies choose to make separate contracts for helium, as they claim." (Br. in Opp., Ashland, et al., p. 11). Upon this fallacious premise, the independent producers purport to erect their case that this petition should not be granted. Within the narrow limitations of the reply brief format, we will show that the premise is invalid.

ARGUMENT

The Federal Power Commission, under the Natural Gas Act, Has Rate Jurisdiction Over the Sale of the Full Stream of Helium-Bearing Natural Gas, Including the Helium Constituent of Such Natural Gas Stream.

The problem confronting the independent producers in these cases is a difficult one. The gas purchase and sales contracts under which they sell and deliver natural gas to these petitioning pipeline companies cover, by their plain language, the full gas stream, including the helium constituent thereof. The district court so held, as did the Circuit Court (App. 26a-27a). This natural gas is "helium-bearing natural gas" as defined in the Helium Act Amendments (App. 212a-213a). If the Federal Power Commission rates cover the full helium-bearing natural gas stream at the point of sale from the independent producers to these petitioning pipeline companies, the independent producers cannot have any basis to be paid twice for the same sale of the same commodity in interstate commerce for resale, and the Court of Appeals erred in holding for the independent producers.

Recognizing this, the independent producers represent in their briefs on no less than sixty-five occasions that these

cases involve a commodity referred to as "commingled helium." This term is one invented[1] by the independent producers for interchangeable usage to mean on the one hand, the helium-bearing natural gas over the sale of which in interstate commerce for resale the Federal Power Commission retains jurisdiction, and on the other, and at the same time, the helium over the sale of which the Federal Power Commission never has jurisdiction.

By their wholesale use of the manufactured phrase "commingled helium" to ambiguously cover both sales, the independent producers have sought to confuse the Court and convey the impression that Congress intended to exempt the sale of helium-bearing natural gas from rate regulation under the Natural Gas Act. Nothing in the clear language or legislative history of either the Natural Gas Act[2] or the Helium Act Amendments permits any such non-symmetrical construction.

In the context of these cases there are two sales involved. *The first* of these *is a sale of helium-bearing natural gas* as defined in the Helium Act Amendments. The landowners lease their lands to the independent producers for the production of helium-bearing natural gas. The producers then produce such helium-bearing natural gas and sell and deliver such helium-bearing natural gas to petitioning natural gas pipelines in the field, on or near the leases where such helium-bearing natural gas is pro-

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1. Helium-gas mixture, and helium-bearing natural gas are defined in the Helium Act Amendments. The phrase "commingled helium" is neither defined in the Act nor even mentioned. Neither is there any record support for this terminology.

2. The Natural Gas Act, in marked contrast to the Interstate Commerce Act, evinces no purpose to abrogate private rate contracts as such. *United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338-339.

duced, as a single homogenous commodity. It is this sale over which the Federal Power Commission retains jurisdiction.[3]

The second sale is that of helium. This sale takes place subsequent to, and, in many instances, far removed from, the sale and purchase of the helium-bearing natural gas on the lease sites, after gathering of the gas by the petitioning natural gas pipelines through a network of gathering lines, and after its transportation through large transmission lines in interstate commerce has commenced. It is covered by separate contract to which the independent producers are not parties. It is this second sale which is exempt.

By using the same phraseology to apply to both sales, the independent producers hope to persuade this Court that the second sale exemption applies equally to the first. But Federal Power Commission jurisdiction cannot be evaded so easily. The independent producers seek an exemption by judicial fiat where, over the years, they have never been able to obtain a legislative exemption. What Congress has joined, this Court should not so easily put asunder.

The sales by the independent producers to the petitioning pipelines are not separate sales of "commingled helium" or "helium" but are rather sales of "helium-bearing natural gas" unaffected by the Helium Act Amendments exempting the sale of helium from rate regulation under the Natural Gas Act. As the Eighth Circuit held:

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3. No services are performed by the independent producers for which they are not compensated under commission regulation. All costs of exploration, production, development, maintenance and operating are fully compensated in the regulated rates. *Permian Basin Area Rate Cases,* (1968) 390 U.S. 747.

"The court concludes that §11 states that the commission has no jurisdiction over the helium 'itself,' either while commingled with natural gas or after it has been extracted. Such exemption from the Natural Gas Act's operation, however, does not prevent the Commission from exercising jurisdiction over 'helium-bearing natural gas.' The statutory language and its legislative history compel this conclusion."[4]

CONCLUSION

As applied to the preexisting contracts between the producers and the pipeline companies for the purchase and sale of helium-bearing natural gas on a volumetric basis, the constitutional issues raised by the lower court's construction of the Natural Gas Act in conjunction with the Helium Act Amendments are both real and substantial. If the provisions of the Natural Gas Act *do* apply to the pricing provisions of such contracts, then the rate schedules control; if the provisions of the Natural Gas Act *do not* apply to the pricing provisions of such contracts, then the contracts control. The producers cannot have it both ways.

Absent any showing that the public objectives of the Natural Gas Act or the Helium Act Amendments require the appropriation of petitioners' contract rights for the private use and benefit of the independent producers under the circumstances of this case,[5] the holding by the Court below is both unreasonable and unconstitutional.

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4. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Com'n*, 359 F.2d 675, 679 (1966). It is hard to believe the independent producers are serious in asserting, as they do, that there is no conflict between the Eighth Circuit and the Tenth Circuit on the issue whether the presence of helium as a constituent of the natural gas stream affects rate regulation under the Natural Gas Act.

5. In all events, the Court of Appeals does not have jurisdiction to make such a determination. ". . . we have heretofore em-

For the reasons above stated, as well as those stated in the Petition for Certiorari, petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

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phasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts." *Permian Basin Area Rate Cases*, (1968) 390 U.S. 747, 767.